THE RIGHT TO SECEDE AND THE CASE OF KASHMIR

A Critical Evaluation of Contemporary Normative Theories of Secession

by

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DECLARATION

I hereby declare that this is my own work and that to the best of my knowledge and belief it contains no material previously published or written by any other person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma of a university or institute of higher learning, except where due acknowledgment is made in the text of this thesis. I also hereby certify that the work contained in this thesis has not been submitted for a higher degree to any other university or institution.

Matthew Webb 9 April 2001

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ABSTRACT

This thesis is an exercise in applied political philosophy. It addresses the moral justifiability of secession within the wider context of liberal political thought by critically examining divergent accounts of how liberalism may justify a moral right for groups to secede from their parent State. Adopting an inter-disciplinary approach, existing theories of a normative right to secede are examined, both in a purely analytical context, and in relation to the contemporary secessionist dispute in the Indian-held State of Jammu and Kashmir.

This analysis focuses on, but is not limited to, the three theories which currently dominate discussion of how liberalism may justify a normative right to secede. Building upon the prior work of other scholars, contemporary theories of secession are contrasted with one another and related to other, associated concepts in political theory. This process of critical engagement emphasises factors which extend beyond the three theories under consideration to both liberal-based theories of secession in general, and also to other, related topics in political theory. Included within this discussion are issues such as the notion of legitimate territorial sovereignty, and the question of special, group-specific rights for national minorities other than a right of independent Statehood.

The thesis deals primarily with material of a highly analytical nature. However, while it does not directly seek to examine the reasons behind the violence in Kashmir, the thesis does provide a detailed historical account of that violence, as well as a description of contemporary Kashmiri political and social life, which may be useful for a more empirical study of the Kashmir dispute and other, similar conflicts. Similarly, because any eventual solution to the conflict in Kashmir and others like it will not only have to take account of the conflicting demands of the various protagonists, but also arrive at some determination regarding their legitimacy, consideration of the moral

justifiability of secession highlights factors which are likely to extend beyond the narrow confines of political theory.

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INTRODUCTION

1.1 INTRODUCTION

One of the defining features of the international political landscape over the last fifty years has been the enormous increase in the number of secessionist movements. Events such as the decline of European colonialism and the fall of Communist regimes in Eastern Europe have initiated a process of political fragmentation which continues to threaten the stability and prosperity of States and whole regions. Previously dormant national identities and cultural groups have suddenly reasserted themselves and demanded that they be afforded their own independent polity, often resorting to a campaign of violence when what they see as their rightful political inheritance is denied them by their parent State. In addition to raising important strategic, socio-political and legal issues, this growth in secessionist-inspired political violence has also raised fundamental philosophical questions concerning the justice of existing international boundaries and the right to political self-determination.

Until recently political theorists discussed secession in connection to other, related issues such as nationalism and largely ignored the need for a normative theory of secession that tells us which, if any, groups (or individuals) possess a right to secede. Whereas the right of States to demand obedience from their subjects, and of citizens to disobey their State, were frequently the subject of scholarly debate, the right of the State to maintain its territorial integrity, and of its subjects to remove a portion of that territory, were not so frequently discussed. Rather, the composition of the State was usually taken as given, and discussions concerning the nature and extent of the State's authority over its subjects were conducted in a manner that mostly disregarded questions regarding the unity of the State itself.

Recently, however, a growing body of philosophical literature on the subject of secession has begun to emerge with different theorists developing divergent accounts of the justification for, and scope of, a right to secede within the general framework of liberal political theory. Nonetheless, while a normative right to secede is an increasingly popular topic of discussion amongst political theorists with several volumes of essays on the topic published quite recently, the debate is still very much in its infancy with new theories still emerging and existing theories being re-interpreted and clarified. More importantly, while numerous theorists have, in the process of developing their own theory and defending it from objection, critically engaged with other, rival theories, there is no full-length, comprehensive study of the three dominant types of theory and their comparative advantages and disadvantages. Similarly, while the issue of a moral right to secede is often raised in relation to other topical discussions in political theory – particularly the question of how liberalism should respond to demands by minority groups for special, group-specific rights – most theorists have typically concentrated on either one question or the other. Consequently, while numerous liberal theorists have developed often quite detailed theories of secession, the linkages between secession and other, associated issues in liberal political theory – especially the minority rights debate – remain largely unexplored.

This thesis seeks to address these outstanding issues by critically evaluating the three types of theory which currently dominate discussion of a normative right to secede. The intention is not to formulate a new theory of secession or to supplant the work of others. Rather, the goal is to contribute to the debate by building upon existing theories through a process of critical engagement with them. In addition to examining each theory's relative merits and weaknesses, a less developed but nonetheless important aim is also to contextualise the question of how liberalism should respond to secessionist demands within a wider theoretical framework that also includes the related issues of: (a) how liberalism should respond to demands by minority groups for special, group-specific rights; and (b) what significance a liberal theory of secession should attach to issues of territory and territorial sovereignty.

This process of critical engagement will consist of two phases. In the first phase – which includes this, introductory chapter plus Chapters Two, Three and Four – the three theories under consideration will be introduced and subjected to critical evaluation. This process will begin by first clarifying the theory in question, comparing it to the other two, rival theories here under consideration, and then critically engaging with the theory in order to determine whether it can provide a satisfactory liberal account of a moral right to secede. In the second phase – which comprises Chapters Five and Six – this analytical study will be complemented by an empirical case-study where the critical insights contained in the previous chapters will be applied to a real-life, contemporary secessionist dispute. The findings of this investigation will then be summarised in a final, seventh chapter which will tie together the preceding claims and then relate these to the overall aims of the thesis.

It is important to remember that while the theories here under consideration are conducted at a high level of theoretical abstraction and sophistication, they nonetheless have as their aim the normative assessment, and eventual resolution, of disputes that are very much a part of the real world. Thus, while the inclusion of an empirical case study may be something of an unusual approach – at least as far as *some* political theorists are concerned – given the type of material here under consideration it is nonetheless an entirely appropriate one. The secessionist dispute that has been chosen as the case-study is the contemporary conflict in the Indian-held State of Jammu and Kashmir.[1] While almost any secessionist conflict would suffice, the case of Kashmir is particularly appropriate because: (a) it contains both variants of the demand to secede (i.e. the demand to form an independent State and the demand to join another, pre-existing State); and (b) the issues raised by the various protagonists to the Kashmir dispute exemplify the three theories considered by this thesis.

The aim of the thesis is, then, to advance the debate on a normative right of secession by critically engaging with, and saying something substantive about, the three leading normative theories of secession with an empirical case-study employed as illustrative material to this end. The reasons for restricting the scope of the thesis to include only these three types of normative theory will be discussed later. For now the important

[1] Which henceforth shall simply be referred to as 'Kashmir.'

point to note is that the goal of the thesis is *not* to articulate a satisfactory account of a moral right to secede. Rather, the more modest goal is simply the comparative assessment of the three leading types of normative theories of secession through a process of critical engagement with them.

Similarly, it must also be emphasised that the purpose of including the case-study on Kashmir is neither to analyse, nor normatively evaluate, claimed rights to secede in Kashmir. The thesis does not seek to examine the reasons behind the political violence in Kashmir or the moral justifiability of Kashmir's political independence from India.[2] Rather, the focus is a much narrower one that includes only the comparative merits of the three leading normative theories of secession. The purpose of including the case-study on Kashmir is to illustrate and probe, or 'test out', the theoretical analysis with empirical evidence by confronting each theory with a real-life secessionist dispute, and examining how the claims made in the preceding theoretical investigation stand up when subjected to empirical scrutiny. A less-developed, but nonetheless important, aim is to determine what broader lessons might be learned from the case of Kashmir for the normative theorisation of secession, by taking some of the claims made in the case of Kashmir and examining how a liberal theory of secession should respond to these.

1.2 WHAT IS SECESSION?

A. Defining Secession

Before the three types of normative theory can be introduced it is first necessary to clarify certain key issues, terms and concepts. These factors will be of significant importance throughout the ensuing analysis and their clarification here should, at the very least, remove the possibility of confusion at a later stage. Following this discussion the three types of theory to be considered in this thesis will be briefly introduced and related back to the preceding theoretical analysis.

[2] Although this is not to say that the issues raised in the thesis may not be relevant to such undertakings.

A normative theory of secession is one which tells us which groups, types of groups, or individuals, possess a right to secede, in what circumstances and why. However, we cannot determine who has, or should have, a right to secede until we know exactly *what it is* to grant such a right. For this reason it is important to clarify the notion of secession and what it means to possess a right to secede. Amongst those theorists who have addressed the issue of a right to secede there is general agreement upon what secession is. Rather, most of the disagreement concerns who, if anyone, possesses a right to secede and why. Thus, the following definition of the term 'secession' is, for the most part, consistent with that offered by other theorists.

Every State claims to possess *authority* – the right to demand obedience with its directives, to coerce those who do not willingly obey and to punish those who disobey. A State's authority may be either *legitimate* or *illegitimate*. To say that a State's authority is legitimate is to say that, subject to certain constraints, the State is *justified* in possessing and exercising its authority. A State's authority is contained within a geographically defined region known as a *territory* over which the State is then said to possess *sovereignty*.[3] Secessionists, or *separatists*, seek to exclude themselves from the authority of the State by redrawing the State's territorial boundaries so as to exclude the territory that they occupy from the State's sovereignty.[4]

Secession is, therefore, a form of refusal to acknowledge the legitimacy of the State's claim to authority – it is a bid for independence from the State through the appropriation of its territory. However, unlike the revolutionary who seeks either to dissolve the State or to completely take it over, the secessionist need not deny the State's authority as such – only its authority over him/her, the members of his/her group, and the territory that they occupy.[5] In most cases demands for secession are demands for both independence from the existing State, *and* sovereignty for the new State that the secessionists intend to create. However, secession, *ex hypothesi*, need not

[3] The significance of territory and territorial sovereignty to a normative theory of secession will be discussed in Chapter Four of this thesis.

[4] See Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), p.10.

[5] Buchanan, p.10.

mean the creation of a new State, as the secessionists may wish to leave one State in order to become a part of another State.[6]

B. What is a Right?

The second, more contentious, issue concerns the nature of rights. It should first be noted that this thesis will be concerned with a *moral* right to secede. Thus, unless otherwise stated, the terms 'a right to secede' and 'a right of secession' will refer exclusively to a moral right. On occasion other forms of the right to secede – in particular a *legal* or *constitutional* right – will be discussed, but only in so far as these are relevant to a moral right of secession. This is not to say that these other forms of a right to secede are of any less importance than a moral right. However, for the purposes of this thesis the discussion has been narrowed to include only a moral right of secession. Not only does this allow a more thorough examination of the issues raised by such a right, but the theoretical literature which with the thesis is concerned deals primarily with the issue of a moral, rather than a legal or constitutional, right to secede.

Rights, and moral rights in particular, are, of course, the subject of enormous controversy amongst philosophers.[7] Not surprisingly most writers on secession have largely sought to avoid this controversy by offering a relatively simple account of what it means to possess a right to secede, and concentrated instead upon the non/justifiability of that right in particular circumstances. On the one hand, the absence of any serious discussion of rights within the secession debate is quite understandable. One should be able to say something of substantive importance on the moral justifiability of secession without first having to resolve the question of moral rights to the satisfaction of moral and political philosophers.

On the other hand, however, one's conception of what a right is, what function rights are supposed to serve, what entities are capable of possessing rights and why, may to a significant degree determine whether or not one is inclined to endorse a particular

[6] In which case the demand to secede is referred to as *irredentism*. This point is particularly important in the case of Kashmir, as amongst those seeking the State's secession there is a divergence of opinion regarding whether Kashmir should secede in order to become an independent State, or to join Pakistan.

[7] Buchanan admits as much himself. See Buchanan, p.27.

group's right to secede in specific circumstances. Hence, one cannot sensibly discuss the issue of a right to secede without first saying *something* about the nature of rights. The intention here is not to construct and defend against objection a comprehensive theory of rights. Such an undertaking would not only be beyond the scope of the thesis but would, at the very least, be a thesis in itself. Rather, along with other commentators in the secession debate, the notion of what rights are and what it is to possess a right will be specified only in general terms in order to avoid possible confusion at a later stage.

Many theorists conceive of a right to secede as a *Hohfeldian liberty right* that gives rise only to *negative* duties upon the parent State and others to not interfere in a group's secession. A Hohfeldian liberty right is defined simply as the absence of a duty, i.e. to say that an agent (X) has a liberty right to perform a particular action (Y) is merely to say that X has no duty to refrain from Y-ing.[8] Under this account if a group (G) has a right to secede from a State (S) this means simply that: (a) G has no duty to refrain from seceding from S; and (b) S (and others) have only a *negative duty* to not interfere in G's seceding.[9] Such an account, however, ignores the fact that in seceding from S, G takes not only territory from S, but also investments which S has made both in that territory (e.g. by building, maintaining and improving roads, buildings and industries) and its inhabitants (e.g. through educating and training them).[10]

We can of course question the moral significance of this fact with respect to the question of justifying a right to secede. Just because, in seceding from S, G would be removing a portion of S's territory and investments, it does not necessarily follow that G would be *unjustified* in seceding from S. Buchanan, for example, claims that S's

[8] See Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1923). Also see Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice Hall, 1973), pp.56-57; and Arthur L. Corbin, 'Legal Analysis and Terminology', *Yale Law Journal*, Vol.29, 1919, pp.163-73.

[9] This seems to be the position adopted by Buchanan who claims that if G has a right to secede from S this means simply that G's secession from S would be *morally permissible* and G has an *enforceable moral claim* against S and others only to not impede its secession (Buchanan, p.27). Similarly, while Margalit and Raz admit that there may be other, additional duties arising from a right of secession (including a duty of the part of the parent State to aid the secessionist group in exercising the right) they agree with Buchanan that the *main* duty is to not impede the seceding group's secession. See Avishai Margalit and Joseph Raz, 'National Self-Determination', *Journal of Philosophy*, Vol. 86, No. 9, 1990, pp.460-61.

[10] On this point see Buchanan, p.105.

material loss as a result of G's secession from it establishes only that G has a duty to offer fair compensation to S, *not* that G's secession from it would be unjustified.[11] Furthermore, as Buchanan also points out, not only do citizens frequently have little say over the investments which their State chooses to make in them and their region, but they are frequently unfree to refuse such investments.[12]

Regardless of the validity of such claims, however, the fact remains that to say that G has a right to secede from S cannot simply mean: (a) that S has only a negative duty to not interfere with G's seceding from it, but, by definition, must *also* mean; (b) that S has a *positive duty* to give G a proportion of its territory and at least some of the assets contained within it. Whether or not G then has a duty to compensate S for this loss is another matter. However, any subsequent compensation (or lack thereof) does not alter the fact that if S has a negative duty to not impede G's secession from it then, *ex hypothesi*, S must also have a positive duty to give G a proportion of its territory and assets. Hence the right to secede cannot simply be a straight forward Hohfeldian liberty right, but must also be a *Hohfeldian claim right* that imposes positive duties upon the parent State from which the group is seceding.[13]

This point has important consequences for a normative theory of secession. Requiring an agent to perform an action will typically impose a greater hardship upon that agent than the simple requirement that the agent refrain from interfering in the performance of actions by other agents. Therefore to claim that others merely have a negative duty to refrain from acting in a particular way, is in most cases to assume a substantially lesser burden of justification than to claim that others have a positive duty to act in a particular way. Yet, in the case of secession it is evident that the parent State *cannot* merely have a negative duty to refrain from interfering in a sub-group's secession but, by definition, must also have a positive duty to transfer to that sub-group a proportion of its territory and the wealth contained within that territory. Consequently, if the right

[11] Buchanan, p.105.

[12] Buchanan, p.105.

[13] A Hohfeldiam claim right is distinct from a liberty right. Unlike a liberty right, a claim right is necessarily the grounds of other peoples' positive duties towards the right-holder. Therefore a claim right is both: (a) a claim to performance of action against other agents; and (b) a claim against others of recognition and enforcement. In the case of secession the 'other agent' is the State from which the group in question is seceding.

to secede is interpreted as bestowing an *enforceable moral claim* upon the right-holder any right to secede will require substantial justification and the class of right-holders may admit relatively few members.

For this reason the thesis will adopt a substantially weaker conception of what it is to possess a right to secede that entails a lesser burden of justification. Under this conception, to say that G 'possesses a right' to secede from S is simply shorthand for saying that G's secession from S in those circumstances would be *morally justified*, or *morally permissible*, and, thus, would not be *morally wrong*. It is *not* also to say that G therefore has an enforceable moral claim against S to allow it to secede by giving G a proportion of its territory and wealth. In other words, the weight of moral reasoning supports G's secession from S without necessarily generating a correlative duty upon S to allow G to secede from it.

To emphasise: one may be morally justified in performing a given action without having an enforceable moral claim against others with respect to that action. For example, I may be morally justified in borrowing my neighbour's lawn-mower without my neighbour being under a correlative duty to lend it to me. While we would not be inclined to regard my borrowing my neighbour's lawn-mower as morally wrong, it is equally true that we would not be inclined to argue that my neighbour has a moral duty to lend it to me, or that I have an enforceable moral claim against my neighbour for the use of his lawn-mower.

Other theorists may favour a stronger conception of rights where, for example, to say that G possesses a right to secede from S is, *ceteris parabis*, to say that G possesses an enforceable moral claim against S to allow it to secede and, therefore, to give to G a proportion of its territory and assets. However, it is not the intention of this thesis to settle such disputes. Rather, the main concern will be to demonstrate under what conditions a group's secession would be morally justified.[14]

[14] Compare with Buchanan, p.27.

1.3 THE ISSUE OF PERMISSIBILITY

A. Introduction

Normative theories of secession are often categorised according to their *permissiveness* with some theories being more permissive than other theories. Consider, for example, the theory of Allen Buchanan, which will be discussed in more detail later. Buchanan claims that a group's interest in preserving its culture is generally not of sufficient moral importance to justify a right of secession (unless that group meets a number of stringent criteria – many of which, by Buchanan's own admission, would be inapplicable to most groups).[15] Margalit and Raz, on the other hand, argue that where political independence would be beneficial to the cultural well-being of a group then that group consequently possesses a right to secede, providing that in doing so they do not harm the fundamental interests of the parent State or violate the basic rights of their inhabitants.[16]

Thus, whereas Buchanan emphasises the State's right to maintain the existing borders of its territorial sovereignty over a group's right to preserve its culture, the opposite is true of Margalit and Raz. Hence, with respect to the interest of cultural preservation, because fewer groups will qualify for a right to secede under Buchanan's theory than under that of Margalit and Raz, Margalit and Raz's theory is said to be *more permissive* than that of Buchanan.[17] Permissiveness is, then, a comparative term. The more permissive a theory of secession, the greater the weight attached by that theory to the right of sub-groups to change the boundaries of a State's territorial sovereignty relative to the State's right to maintain those boundaries. Thus, theories that are less permissive than other, rival, theories admit comparatively fewer members to the class of holders of a right to secede and consequently justify relatively fewer instances of secession over time.

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[15] Buchanan, p.61.

[16] See Margalit and Raz, pp.448ff.

[17] Buchanan, of course, does argue that there are other, more compelling reasons for granting a right to secede than cultural preservation. These additional reasons will be investigated in detail later in the thesis.

B. A Continuum of Permissibility

Within the existing body of normative literature on secession we may distinguish a number of different positions concerning the question of how permissive a theory of secession should be. At one extreme is what Buchanan terms the *absolutist interpretation of territorial integrity*, where the State's interest in preserving its territorial integrity is supreme and there is *no* right to secede, i.e. secession is *never* a justified form of action.[18] Arguments in favour of an absolutist interpretation of territorial integrity are generally based upon the claim that the negative consequences produced by a sub-group's secession – or, as is more often the case, the *probability* that they *might* be produced – morally outweigh any right that the sub-group may have to political self-determination. Additionally, it is also claimed that breakaway States tend to be sociologically and ethnically homogenous, and that this lack of internal plurality tends to undermine democracy.[19]

At the other extreme lies the claim that the State's interest in preserving its territorial integrity is always overridden by a group's interest in political self-determination, i.e. secession is *always* a justified course of action and, *a fortiori*, attempts by the State to resist secession are never justified. Theorists who favour an *absolute right of secession* generally place overriding emphasis upon what will be termed the *principle of voluntary political association*, which states that the only legitimate political associations are those which are based upon the free consent of all moral agents within the association. Where this consent is withdrawn, or was never given in the first place, any attempt to stop the dissenting party seceding would violate the requirement that the association be a voluntary one and hence be illegitimate.

Because States not infrequently behave in an immoral manner, and secession may on occasion be an effective means of remedying a condition of State-perpetrated injustice, many theorists are loathe to grant the State an absolute right to maintain its territorial integrity and so reject the absolutist interpretation of territorial integrity. On the other

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[18] Allen Buchanan, 'Theories of Secession', *Philosophy and Public Affairs*, Vol.26, No.1, 1997, p.50

[19] In support of this latter claim it is pointed out that many newly created States are frequently no more democratic than the State from which they seceded. See, for example, Amitai Etzioni, 'The Evils of Self-Determination', *Foreign Policy*, 89, 1992. This claim will be addressed in greater detail in the following chapter.

hand, however, it is equally true that a group's secession is likely to affect important and diverse interests of many people; not just the interests of the members of the group doing the seceding or, for that matter, the interests of the parent State. Thus, most theorists also agree that the right to secede should not be absolute and that there should be conditions placed upon its exercise. Consequently, between the absolutist interpretation of territorial integrity and an absolute right to secede, there exists a continuum of permissiveness where varying degrees of emphasis are placed upon both the right to secede *and* the right of States to maintain their territorial integrity.[20] Hence theorists such as Buchanan maintain both that: (a) the State possesses a legitimate right to maintain its territorial integrity; *and* also (b) that there are certain conditions under which a State and its claim to territorial sovereignty is illegitimate with respect to a particular group, and consequently this group possesses a right to secede and should be permitted to do so.

The problem now is to specify exactly what these conditions are so that we may determine whether or not a given group in a particular situation possesses a right to secede. These conditions may be stated both positively (e.g. a group *must* perceive itself as having a separate culture/tradition) or negatively (e.g. a group's secession *must not* infringe the rights of others living in the territory).[21] However, in both cases the effect of these conditions, or provisos, is the same, i.e. they restrict the scope of the right's application to only those groups which are capable of satisfying them. Whether or not these same conditions will apply to other groups, and if so what sort of groups, how many, and in what circumstances, will depend upon *what* these conditions are. Therefore the same conditions which justify the possession of a right to secede will also determine that right's degree of permissiveness, or *scope of application*.[22]

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[20] See Brilmayer who discusses, albeit briefly, the problem of determining how much moral weight we should attach to preserving the 'status quo.' Lea Brilmayer, 'Secession and Self Determination: A Territorial Re-Interpretation', *Yale Journal of International Law*, Vol.16, No.1, January 1991, p.199.

[21] Kai Nielsen, 'Secession: The Case of Quebec', *Journal of Applied Philosophy*, Vol.10, No.1, 1993, p.30.

[22] Notice, however, that even if there is general agreement concerning *what* these conditions are, there may remain disagreement as to whether or not they have in fact been *met* in any particular case. Refer R. E. Ewin, 'Can There Be a Right to Secede?', *Philosophy*, Vol.70, 1995, p.349. Also see R. E. Ewin, 'Peoples and Secession', *Journal of Applied Philosophy*, Vol.11, No.2, 1994.

Amongst those theories that claim that secession may be a justifiable form of action, a distinction is often made between 'permissive' theories which contain a presumption in favour of secession, and 'less-permissive' theories which contain a presumption in favour of maintaining the status quo.[23] Examples of permissive theories of secession are those of David Gauthier,[24] Harry Beran[25] and Christopher Wellman.[26] All three theorists base their account of the right to secede upon the liberal-democratic principle of voluntary political association outlined earlier,[27] but place restrictions upon the right's exercise. Thus, for all three theorists there is a presumption in favour of a right of secession that may on occasion be defeated, but only where it can be adequately demonstrated that exercise of the right would violate the rights of others and/or produce certain overriding negative consequences. Conversely, theorists who subscribe to the less-permissive view, such as Buchanan and Birch,[28] emphasise that the seceding group is taking a portion of the State's territory and claim that for this a strong justification is required.[29] Hence, there is a presumption in favour of maintaining the existing boundaries of a State's territorial sovereignty that is defeated in only the most unusual circumstances and, consequently, while there may in certain circumstances exist a right of secession, it is a right that applies to few groups over time.

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[23] Theories of secession are frequently categorised according to their degree of permissibility (i.e. how many members are admitted to the class of holders of the right relative to other, competing theories). See, for example, Percy, B. Lehning, 'Theories of Secession: An Introduction' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998). Also see Buchanan (1997).

[24] David Gauthier, 'Breaking Up: An Essay on Secession', *Canadian Journal of Philosophy*, Vol.24, No. 3, September 1994.

[25] Beran has been a prolific writer on the issue of a normative theory of secession, some examples of his work include the following: 'A Liberal Theory of Secession', *Political Studies*, Vol.32, No.1, 1984. *The Consent Theory of Political Obligation* (Beckenham: Croom Helm, 1987); 'Self-Determination: A Philosophical Perspective' in *Self-Determination in the Commonwealth*, ed. W. J. A. Macartney (Aberdeen: Aberdeen University Press, 1988); 'More Theory of Secession: A Response to Birch', *Political Studies*, Vol.36, No.2, 1988; 'Border Disputes and the Right of National Self-Determination', *History of European Ideas*, Vol.16, No.4-6, 1993; 'The Place of Secession in Liberal Democratic Theory' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994); 'A Democratic Theory of Political Self-Determination for a New World Order' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998).

[26] Christopher H. Wellman, 'A Defence of Secession and Political Self-Determination', *Philosophy and Public Affairs*, Vol.24, No.2, 1995.

[27] See below.

[28] See, for example, Buchanan (1991). Also see, Anthony, H. Birch, 'Another Liberal Theory of Secession', *Political Studies*, Vol.32, No.4, 1984.

[29] The proper role of territory in a normative theory of secession, and the requirement that secessionists must establish legitimate title to the territory the seek to remove from the State will be examined later in this thesis.

C. Introducing the Three Types of Secession

Following the 1991 publication of Allen Buchanan's influential work *Secession*, a considerable body of theoretical literature has emerged on the issue of a normative right to secede and the conditions under which such a right may, or may not, exist. As was noted earlier, these competing theories have frequently been categorised according to their relative degree of permissiveness into the two opposing camps of 'permissive' and 'less-permissive' theories. More recently, however, a trichotomy has emerged based, not upon how many *instances* a given theory may justify, but, rather, upon what pre-requisite *conditions* the theory requires would-be secessionists to fulfil in order to possess a right of secession. These three rival theories – within which, as we shall soon discover, there are further sub-divisions – may be summarised as follows:

1. *Nationalist theories* claim that individuals may be categorised into separate groups known as 'nations' and that these nations are the sole legitimate holders of any right to secede.

2. *Just Cause* or *Remedial Right* theories grant a right of secession to groups that are the victim of certain injustices for which secession is deemed to be an appropriate remedy of last resort.

3. *Plebiscitary Right*, or *Liberal-Democratic*, theories are based upon the principle of voluntary political association and claim that any territorial majority which expresses a desire to secede should, subject to certain side constraints, be permitted to do so.

Typically, Liberal-Democratic (LD) theories are characterised as being the most permissive of the three types of theory followed by Nationalist and Just Cause (JC) theories in that order. Because, under the LD model, a group possesses a right to secede wherever secession is desired by a majority of the group's members, the LD theory is generally regarded as more permissive than the other two types of theory. Nationalist theories of secession, on the other hand, are usually regarded as being less permissive than LD theories simply because there are fewer possible nations in the world than there are democratically self-defined groups, depending upon how the term

'a nation' is defined. Finally, because JC theories typically require would-be secessionists to be the victim of a serious injustice for which secession is deemed to be an appropriate remedy of last resort, they are usually interpreted as the least permissive of the three types of theory.

Later this ranking of the three types of secession theory will be questioned and the claim made that there is nothing inherent to any of the three types of theory that necessarily renders it less or more permissive than the other, rival, types of theory. For example, depending upon what injustices it regards as sufficient to justify a right of secession, a JC theory may be relatively more or less permissive than, say, a Nationalist theory based upon a strict definition of nationhood which comparatively few groups would be capable of satisfying. This, however, is not to say that the notion of permissiveness is therefore redundant. Indeed, numerous theorists appeal to the notion of permissiveness in various contexts in order to bolster the claim that their theory is superior to other, rival theories.

However, not only is categorising theories according to their degree of permissiveness misleading, but permissiveness is only one variable by which different theories of secession may be classified. Moreover, simply ranking different theories according to their permissiveness, and lumping different theories into the same class because they would justify a similar number of secessions over time, overlooks fundamental differences that may exist between these different theories in terms of what sorts of groups they grant a right of secession to, in what circumstances and why. Thus, because the trichotomy between Nationalist, JC and LD theories captures more of the fundamental elements of a theory than the simple permissive/less-permissive distinction introduced above, it is, at least in my view, a much more satisfactory means of distinguishing between different theories of secession and hence is the method of classification that this thesis will adopt.

2

NATIONALIST THEORIES OF SECESSION

2.1 INTRODUCTION

The purpose of this chapter is to critically assess the first type of secession theory – Nationalist theories – which claim that there is a right to secede and that this right is possessed exclusively by certain sociological entities known as nations. Because the ensuing analysis deals with a wide range of material which covers a number of different and complicated issues, it will first be useful to set out the structure and general themes of the chapter. This should not only clarify the overall aims of the chapter, but also ensure that the significance of the numerous points made below to these aims is immediately apparent.

The chapter will begin by briefly outlining the rival Liberal-Democratic (LD) theory of secession. While the LD theory of secession will be addressed in detail in Chapter Four, because the principles upon which it is premised are also relevant to Nationalist theories of secession, it will be useful here to briefly introduce the LD theory and its underlying liberal rationale. The chapter will then investigate the difficulties associated with defining the nation. If, as the Nationalist theory suggests, nations are the only legitimate holders of a right of secession then a satisfactory definition of the nation must be found which is capable of both distinguishing the nation from other, similar social groups and different nations from one another.

The first question is, then, 'What is the nation?' The chapter will consider the two approaches to this question which currently dominate the contemporary normative

literature on nationalism. The first approach is to appeal to certain objective criteria such as a common language, culture, ethnicity and history. This, however, raises the difficulty of how to distinguish between, for example, two dialects of the same language and two different languages. Similar threshold problems also exist with the second approach which is based upon subjective criteria and which, like the objective approach, will also be rejected because of a tendency to bestow conflicting rights and an inability to successfully single out nations from other sociological groups or different nations from one another.

The second question is, even if a satisfactory definition of the nation is forthcoming, 'Why should nations, and *only* nations, be the holders of a right to secede?' The final task of the chapter will therefore be to critically assess arguments given in support of the claim that nations should be the exclusive holders of a right of secession. These arguments will be divided into two different types: (a) those that claim that the State may be more democratic or better able to overcome coordination problems endemic in the provision of certain collective goods, if the individuals that populate it are drawn from a single national community; and (b) those that claim that individuals can only flourish if the national communities of which they are a constituent component also flourish and that this requires that, wherever practicable, nations be granted their own State.

The former claim will be rejected because of an inability to establish that the nation is the only, or the best, form of community required for democratic government, or that it is uniquely able to overcome coordination problems in the provision of public goods. Similarly, the latter assertion will also be rejected by claiming that even if continued membership in, and the flourishing of, certain cultural groups is a prerequisite to individual freedom and well-being, there is no reason to believe that the nation is the only, or the best, example of such a group or that the welfare of such groups may not be adequately protected by less-extreme measures than full political independence. Consequently, even if the nation can be successfully distinguished from other, similar entities it nonetheless remains entirely arbitrary to single out nations as the sole bearer of a right to secede.

2.2 THE LIBERAL-DEMOCRATIC THEORY OF SECESSION

A. Introduction

While a three-way distinction between Nationalist, Just Cause and LD theories is superior to simply categorising different theories according to the single variable of permissiveness, this is not to say that there are not also some difficulties in distinguishing between these three types of theory and then dealing with each separately. For example, many of the considerations relevant to one type of theory are also to varying degrees relevant to one, or both, of the two alternative theories. Thus, while these three types of theory are, indeed, distinct from one another in important respects, they also share many similarities.

A good example of this inter-relatedness is the claim, considered in Section 2.5 of this chapter, that we should be concerned about nations and granting them a right of secession because nationalism is not only consistent with liberalism, but is required by it. While issues pertaining to the LD theory will be dealt with in Chapter Four, because some of these same issues are also pertinent to Nationalist theories it will be helpful to here introduce the LD theory and the *individualistic moral ontology* which underlies it. Not only may this enable us to better understand Nationalist theories by having something to compare them to, but it will also allow us to critically evaluate those elements of the Nationalist theory premised upon liberal axioms but which are best dealt with in detail elsewhere.

B. What is the Liberal Democratic Theory of Secession?

The LD theory of secession may be simply defined as the claim that any territorial majority which expresses a desire to secede should, subject to certain side constraints, be permitted to do so. The theory begins with the liberal claim that individuals are the ultimate unit of moral worth and, thus, what we should really be concerned with is *individual* well-being.[1] This individualistic moral ontology is then combined with a thesis of *moral egalitarianism* which states that all individuals are of equal moral worth

[1] See, for example, Brian Barry, 'Nationalism Versus Liberalism', *Nations and Nationality*, Vol.2, No.3, 1996, p.432.

and, therefore, that each individual has equal rights and entitlements.[2] For the liberal, there are two preconditions for leading a good life: (a) individuals must be free to lead their lives 'from the inside' (i.e. in accordance with *their own* beliefs about what gives value to life);[3] and (b) individuals must be free to question those beliefs, to examine them in light of new experiences and information, and to revise them if they prove unworthy of continued allegiance.

The former consideration – that individuals are autonomous moral entities that occupy a position of moral dominion regarding their own affairs – proscribes other individuals and agencies such as the government externally imposing values upon the individual and forcing individuals to live their lives 'from the outside.'[4] Hence, liberalism grants the individual certain fundamental rights which proscribe such interference, allowing individuals to lead their lives as they see fit without fear of punishment and discrimination. The latter consideration – that individuals be free to question their beliefs, to acquire an awareness of alternative conceptions of the good life and critically evaluate such views – explains the liberal concern for education and rights to freedom of association and expression.[5]

While liberals generally agree that the State has a role to play in ensuring an environment conducive to each individual's pursuit of their own conception of the good life, there is some disagreement as to exactly how far the State should go in providing such an environment. Such disagreements aside, it is evident that both *laissez faire* (neo-)classical liberals and interventionist welfare liberals face a problem in justifying a coercive institution such as the State. By issuing directives that require or proscribe the performance of certain actions, using the threat of sanctions to ensure compliance with those directives and punishing those who disobey, the State restricts the value which

[2] See, for example, Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), p.140.

[3] See Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), pp.80-81 and Kymlicka (1989), pp.9-13.

[4] See Allen Buchanan, 'Assessing the Communitarian Critique of Liberalism', *Ethics*, Vol.99, No.4, 1989, p.854.

[5] See Kymlicka (1995), p.81. Also see Harry Brighouse, 'Against Nationalism' in *Rethinking Nationalism*, ed. J. Couture, K. Nielsen and M. Seymour (Calgary: Calgary University Press, 1996), p.372.

liberalism seeks to protect – i.e. individual liberty.[6] Moreover, if the individual stands in a position of complete moral dominion over him/herself such that no second party is justified in coercing him/her (providing his/her actions do not harm others), then it seems that existing States must illegitimately interfere in the lives of their subjects.[7] As Wellman notes: "... it seems problematic that liberalism understands the individual to occupy a position of moral dominion regarding her affairs and yet simultaneously insists that the state is justified in encroaching upon this dominion"[8]

One response to this difficulty has been to premise the legitimacy of the State upon the consent of its citizens. Because, under the consent theory, the obligation which agents have to obey the State is a self-assumed one, it is argued that the theory successfully reconciles the value of individual freedom with the State's exercise of coercive authority. A corollary of the consent theory of political obligation is the *principle of voluntary political association* which states that if each individual enjoys moral dominion regarding themselves such that only their consent is sufficient to determine membership of a political union, then individuals have the right to associate politically with whomever they choose to associate with, and the only just political divisions are those which reflect the willingness of people to live together.[9] An analogy is often made with marriage where "I may have the right to marry the woman of my choice who also chooses me, but not the woman of my choice who rejects me."[10] Moreover, because any such association must be mutually desired by all parties if it is to possess any normative weight, where an individual expresses a desire to leave a particular association then any attempt to halt their departure would be contrary to the requirement that all associations be voluntary and hence, by definition, be illegitimate. To continue the marriage analogy: secession is simply the political equivalent of no-fault divorce.

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[6] Christopher H. Wellman, 'A Defence of Secession and Political Self-Determination', *Philosophy and Public Affairs*, Vol.24, No.2, 1995, p.150.

[7] See, for example, Wellman, p.155.

[8] Wellman, p.150.

[9] Michael Freeman, 'The Priority of Function Over Structure: A New Approach to Secession' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.19-20.

[10] David Gauthier, 'Breaking Up: An Essay on Secession', *Canadian Journal of Philosophy*, Vol.24, No. 3, September 1994, pp.360-61.

Finally, if only the individual's consent is sufficient to determine membership of a political association, then this suggests that each individual has the right to secede unilaterally from any State to which they have not consented (or from which they have withdrawn their consent).[11] However, most LD theorists deny this suggestion and instead include a majoritarian thesis where a *geographical region* possesses a right to secede if a (substantial) majority of its members favour secession. Additionally, the right is then often subordinated to considerations of stability and viability by the inclusion of certain conditions which would-be secessionists must first fulfil if they are to possess a right to secede.[12]

2.3 IDENTIFYING THE NATION

A. Introduction

The LD theory outlined above bases the right to secede on the right of *individuals* to associate politically with whomever they choose to associate with, and through the incorporation of a majoritarian thesis then grants a right of secession to democratically self-defined *groups*. Other theorists have criticised the LD theory by claiming that it is inconsistent to claim that the right to secede is an individual right, *and* that the right is granted to, and exercised by, only democratically self-defined *groups* of individuals.[13] These are issues that will be examined in greater detail in Chapter Four. For the moment it will be sufficient simply to note that the LD theory understands secession as a collectively exercised *individual* right and *not* a group right.[14] In contrast, Nationalist

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[11] For theorists who support such a position see Hans-Hermann Hoppe, 'Small is Beautiful and Efficient: The Case for Secession', *Telos*, No.107, 1996, and 'The Western State as Paradigm', *Society*, Vol.35, No.5, 1998; Donald Livingstone, 'The Very Idea of Secession' *Society*, Vol.35, No.5, 1998; Murray N. Rothbard, 'Nations by Consent: Decomposing the Nation-State' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998); and Clyde N. Wilson, 'Secession: The Last Bulwark of Our Liberties' State' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998).

[12] e.g. the seceding unit be sufficiently large to assume the basic responsibilities of an independent State and it must not occupy an area which is culturally, militarily or economically essential to the parent State. See Harry Beran, 'A Democratic Theory of Political Self-Determination for a New World Order' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.36-42.

[13] See, for example, Allen Buchanan, 'Self-Determination, Secession, and the Rule of Law' in *The Morality of Nationalism*, ed. Robert McKim and Jeff McMahan (New York: Oxford University Press, 1997), p.315; Richard T. De George, The Myth of the Right of Collective Self-Determination' in *Issues of Self-Determination*, ed. William Twining (Aberdeen: Aberdeen University Press, 1991), p.2; and Lea Brilmayer, *Justifying International Acts* (New York: Cornell University Press, 1989), p.77.

[14] Scott Boykin, 'The Ethics of Secession' in *Secession, State and Liberty*, ed. David Gordon (New

theories of secession grant a right of secession exclusively to certain groups of individuals known as *nations* rather than to the individual constituent members of these nations.[15]

If, as the Nationalist model claims, the right to secede is a group, not an individual, right then, given that individuals may be categorised into an almost limitless number of groups by all manner of criteria (e.g. race, gender, height, shared tastes/preferences etc.), a Nationalist theory of secession must first specify a set of criteria which not only distinguishes different nations from one another, but which also distinguishes nations from other, similar social conglomerates who do *not* possess such a right. Secondly, assuming that a satisfactory definition of nationhood is forthcoming, it must then be shown *why* nations, and only nations, should possess a right to independent Statehood.

B. Objective Criteria of Nationhood

Numerous theorists have suggested various criteria to distinguish the nation from other similar social entities and to differentiate between different nations. One such approach has been to define a nation in terms of certain *objective* criteria, and claim that where a group of individuals share some or all of these features then they may consequently said to form a nation and, hence, be eligible for the right to secede and create their own State.[16] By far the most common examples of such objective criteria, and therefore the ones that will be considered here, are: a common language; history; ethnicity; and culture. In contrast, other theorists reject a purely objective definition of nationhood as being too problematic. Instead they prefer a *subjective* definition of nationhood where a group becomes a nation when membership of the nation is a constituent component of each individual member's personal identity.[17]

Brunswick: Transaction Publishers, 1998), p.70.

[15] See Beran, p.32.

[16] On the contrast between objective and subjective criteria of nationhood see, for example, Stanley G. French and Storrs McCall, 'Nation, State, Sovereignty, Self-Determination, The Popular Will and the Right to Secession. Notes Toward the Elucidation of these Notions in the Context of the Debate Concerning Canada's Future' in *Philosophers Look at Canadian Confederation*, ed. Stanley G. French (Montreal: Canadian Philosophical Association, 1979), p.63; and Michael Freeman, 'Nationalism, Liberalism and Democracy' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994), p.83.

[17] For an exposition of the subjective approach see, for example, Daniel Philpott, 'In Defence of Self-Determination', *Ethics*, Vol.105, 1995, pp.365-66; and David Copp, 'Do Nations Have the Right of Self-

As theorists such as Philpott and French point out, however, a purely objective account is incapable of providing a satisfactorily definition nationhood. To begin with, linguistic, cultural, historical and ethnic distinctiveness, rather than being binary features[18] are in fact matters of degree. This makes it difficult to determine exactly where to draw the threshold between, for example, two dialects of the same language and two separate languages.[19] For example, there is very little difference between the English spoken in (the north of) the United States and that spoken in most parts of Canada. The differences are, however, more noticeable, when comparing American English with, say, Australian English – although we would for the most part still be inclined to refer to both as being the *same* language. If, however, we were to compare American or Australian English with, say, Pidgin English spoken in Papua New Guinea,[20] then most people would probably conclude that Pidgin English is a separate language from American/Australian English.

The question is, however, at exactly what point do these differences reach a sufficient level where we can justifiably say that we are no longer dealing with two dialects of the *same* language but, rather, two *separate* languages? The same problem also pertains to the other three criteria, for example, "[t]he histories of many groups exhibit frequent discontinuities, infusions of new cultural elements from outside, and alternating degrees of assimilation to and separation from other groups."[21] Once again, at what point does the infusion of new cultural elements, create a new history rather than simply modify an existing history? So the first problem with an objective definition of nationhood concerns the practical implementation of the definition – i.e. how we can coherently apply the criteria to distinguish between separate languages, histories etc. and, thus, separate nations.[22]

Determination?' in *Philosophers Look at Canadian Confederation*, ed. Stanley G. French (Montreal: Canadian Philosophical Association, 1979), pp.72-74.

[18] i.e. all-or-nothing.

[19] The example is from Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), p.49. Also see, Allen Buchanan, 'Secession and Nationalism' in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Oxford: Basil Blackwell, 1993).

[20] Which differs considerably from both languages and would be largely unintelligible to speakers of American and Australian English.

[21] Buchanan (1991), p.49.

[22] There is also the added difficulty that, at least with respect to the criterion of a common history, the objective definition of nationhood seems to have gotten things backward, i.e. rather than appealing to a

Furthermore, it is clear that the groups identified as nations under such an account are likely to conflict with our pre-theoretical intuitions as to what a nation is. Take the criterion of a common language: while English is spoken in England, Canada, the United States, Australia and New Zealand – albeit with some subtle, and perhaps not so subtle, variations – we would not be inclined to say that these five States therefore constituted the same nation. Indeed, just as a defining feature of what it is to be a New Zealander is that one is *not* an Australian, the same may be said of Canadian national identity with respect to the United States.[23] The same is true of a common culture and ethnicity. Just as many Canadians and Americans share the same language, they often also share the same culture and ethnic background, yet they still remain two distinct nations in their and most other peoples' minds.

Indeed, linguistically and culturally residents of the northern United States – particularly residents of, say, Washington State and Vermont – arguably have more in common with the people of Canada than with those in the southern regions of the United States, yet most North Americans would not regard this as sufficient reason to thus describe themselves as being Canadian rather than American and *vice versa*.[24] Moreover, just as people who share the same language and culture may be members of different nations, so may a single nation be constituted by people with divergent linguistic and cultural backgrounds. The language and culture of the people of Paris are different from that of the people of the region of Carcasonne, yet both groups of people are commonly taken to be members of the same nation of France.[25]

Furthermore, many groups which we tend to think of as nations, while perhaps being relatively culturally, linguistically and even historically homogenous are, nonetheless,

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common history to identify a people, we can recognise the history of a people only *after* we have first identified who the people are. For example: "...we can know the history of the English only if we already know (at least in rough and ready terms) who the English are." See R. E. Ewin, 'Peoples and Secession', *Journal of Applied Philosophy*, Vol.11, No.2, 1994, p.228.

[23] Try telling a New Zealander that they share the same national identity as Australians (because they speak the same language), and I suspect that the negative response elicited will generally be similar to that of a Canadian being informed that they belong to the same nation as Americans. On this point see Ewin, p.228.

[24] The same point is made by Miller with respect to Austrians and Germans. See David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), p.22.

[25] The example is borrowed from Copp, p.72.

often ethnically diverse.[26] This is especially true of immigrant societies. No matter how much immigrants assimilate to the majority culture and language they will remain unable to alter their ethnicity,[27] in which case, if ethnicity is a criterion of nationhood, there can be no American or Australian nation.[28] The same problem also exists with respect to the criteria of a common culture, language and history. Because many immigrants to varying degrees retain the culture, language and historical traditions of their former homeland, making such features criteria of nationhood will effectively disqualify them from national membership in their new land. This, however, seems counter-intuitive. Rather, we want to say that *despite* their ethnic differences, people can be members of the same nation, e.g. just as an individual of Asian descent may be an American, so too may a Black, Hispanic or European. Indeed, the success of immigrant societies such as the United States is in many ways dependent upon their ability to construct and promulgate a *supra-national* identity that transcends the ethnic, religious, linguistic and cultural differences exhibited by their citizenry.

C. Subjective Criteria of Nationhood

Most theorists, realising the difficulties associated with a purely objective definition of nationhood, instead propose a subjective definition with the result that nations do not exist independently of the beliefs which people have about them.[29] Subjective definitions of nationhood generally take one of two forms. The first of these discards objective criteria altogether and conceives of the nation as a wholly self-defining group, i.e. a group of individuals become a nation simply by conceiving of themselves as

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[26] See David George, 'The Ethics of National Self-Determination' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994), p.79.

[27] On the non-voluntary, exclusive nature of ethnicity and its inappropriateness as a moral basis for the State see, Brian Barry, 'Self-Government Revisited' in *The Nature of Political Theory*, ed. David Miller and Larry Siedentop (Oxford: Clarendon Press, 1983), p.134; Percy, B. Lehning, 'Theories of Secession: An Introduction' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.9-10; Freeman, pp.17-19; Alexis Heraclides, 'Secession, Self-Determination and Nonintervention', *Journal of International Affairs*, Vol.45, No.2, 1992, pp.409-410; Asborn Eide, 'In Search of Constructive Alternatives to Secession' in *Modern Law of Self-Determination*, ed. Christian Tomuschat (Dordrecht: Martinus Nijhoff, 1993), pp.143-44; and Thomas Pogge, 'Group Rights and Ethnicity' in *Nomos 39: Ethnicity and Group Rights*, ed. Ian Shapiro and Will Kymlicka (New York: New York University Press, 1997).

[28] Barry (1983), pp.138-40.

[29] On the role of peoples' beliefs in the determination of a nation see, for example, Paul Gilbert, 'Communities Real and Imagined: Good and Bad Cases for National Secession' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998).

such.[30] This is not to say that the members of the nation may not share certain objective features such as a common language and culture – after all it is only natural that one would identify and wish to associate with those with whom one shares such things in common – merely that such factors are not the *source* of the group's identity as a nation.[31] So while the presence of certain objective features may *cause* the members of a group to identify with one another and thus develop a sense of national solidarity, it is this sense of solidarity – *not* the presence of the objective criteria – which bestows the status of nationhood, and hence the ability to possess a right to secede.[32]

Conversely, other theorists argue that subjective criteria are a *necessary*, but not a *sufficient* condition of nationhood, i.e. an occasional group of individuals lacking any shared characteristics *cannot* turn itself into a nation merely by the power of its own will.[33] An example of this definition of nationhood is that of Yael Tamir who argues that a group of individuals constitute a nation when they: (a) exhibit a sufficient number of shared objective characteristics such as a common culture, history, language etc; and (b) are *conscious* of their distinctiveness and are bound together by a sense of solidarity which this consciousness creates.[34] Similarly, Margalit and Raz identify a combination

[30] On subjective criteria of nationality see, for example, French and McCall, p.63; Philpott, pp.365-66; and Barry (1983), pp.139-40.

[31] Freeman (1994), p.83.

[32] See Harry Beran 'The Place of Secession in Liberal Democratic Theory' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994), p.48; and J. S. Mill, 'Considerations on Representative Government' in *Utilitarianism, Liberty, Representative Government*, ed. H. Acton (London: J. M. Dent, 1972).

[33] Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993), p.66.

[34] Tamir, p.66. Tamir does not specify what counts as a 'sufficient' number of shared, objective characteristics although she seems to believe that these objective characteristics are much less important than the subjective criterion of a shared self-awareness or distinctiveness in what it is to be a nation. Indeed, as Tamir admits, some groups which we are inclined to think of as nations cannot be defined on the basis of objective criteria (e.g. the Jewish nation). See Tamir, pp.65-66. The importance of subjective criteria in the definition of nationhood is also emphasised by Beran who, while dismissing the claim that a right of secession should be possessed by nations, argues that in order to constitute a nation individuals must not only possess certain distinguishing features such as race, language and religion, but also *be aware* of their distinctiveness. See Harry Beran, 'Border Disputes and the Right of National Self-Determination', *History of European Ideas*, Vol.16, No.4-6, 1993, p.480. For other theorists who combine objective and subjective criteria to define a nation (or 'a people') see Keith Dowding, 'Secession and Isolation' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.81; Simon Caney, 'National Self-Determination and National Secession: Individualistic and Communitarian Approaches' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.152; David Miller, 'On Nationality', *Nations and Nationalism*, Vol.2, No.3, 1996, p.413; and 'In Defence of Nationality' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994), pp.19-20.

of objective and subjective criteria: (a) the group must have a common character and culture; (b) people growing up among members of the group should acquire the group culture, and be marked by its character; (c) membership in the group should be a matter of informal acknowledgment of belonging by other members of the group; (d) membership in the group must be important to one's self-identification; (e) membership must be a matter of belonging, not achievement, and will usually be determined by non-voluntary criteria; and (f) the group should not be a small face-to-face group in which most members personally know most other members, rather mutual recognition should be secured by the possession of general characteristics.[35]

On the one hand, a subjective definition of nationhood seems to have some advantages over a purely objective approach. As was noted above, one of the problems with a purely objective definition of nationhood is its tendency to lump together groups who speak the same language, practice the same culture and so forth as one nation, whereas intuitively we often want to say that these groups constitute separate nations despite having such things in common. By including subjective notions of solidarity, identification and a sense of belonging there is no longer any difficulty in claiming, for example, that Australia and New Zealand, despite their numerous linguistic, cultural and historical similarities, are nonetheless two separate nations.[36] Furthermore, the definition also makes sense of the claim that a group may, for example, be ethnically diverse and yet still constitute a single nation. Thus, despite the fact that many Australians come from very different historical and ethnic backgrounds, they may nonetheless identify with one another as Australians creating a common identity which enables us to coherently describe Australia and its inhabitants as a single nation.

Subjective criteria may also be employed to distinguish the nation from other, arbitrary groupings of individuals to whom we might not be inclined to grant the sort of rights which we may want on occasion to grant to nations. The point is related to what is often termed the 'Pandora's Box' objection to group-differentiated rights. Put simply the objection claims that if we are to grant special rights (including the right to self-government) to certain groups such as indigenous peoples then, given that people can

[35] Avishai Margalit and Joseph Raz, 'National Self-Determination', *Journal of Philosophy*, Vol. 86, No. 9, 1990, pp.443-47.

be categorised into an almost limitless number of groups by all manner of criteria, we should also grant similar right to other groups such as the fiction-reading public or the Tottenham Football Club supporters.[37] Yet most people would baulk at the suggestion that these other groups should be afforded rights of self-government, not least of all because of the consequences such a move would produce.

Subjective criteria – particularly the role that one's membership of the group plays in one's sense of self-identification and self-definition – are often appealed to in order to distinguish the nation from, say, the fiction-reading public and other similar groups.[38] In this manner subjective criteria may, at least in some cases, effectively overcome the objection that granting special, group-specific rights to nations also commits us to granting the same rights to other, less-deserving collections of individuals.[39] Note, however, that even if membership of a nation *is* a constitutive component of one's sense of self-identity and self-definition in a manner that membership of other groups such as the fiction-reading public is not, the question still remains *why* nations should be singled out as the exclusive holder of special rights.[40]

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[36] Because the inhabitants of both countries identify themselves as such.

[37] The examples are borrowed from Margalit and Raz, p.443.

[38] See Margalit and Raz, pp.445-46.

[39] e.g. Fliss argues that those groups who qualify for special, group rights are distinguished by the fact that their members explain who they are by reference to their membership in the group and that the group has a distinct existence apart from its members – i.e. the group is not reducible to its individual members (Owen Fliss, 'Groups and the Equal Protection Clause', *Philosophy and Public Affairs*, 107, 1976). Similarly, McDonald and Young make a distinction between: (a) *aggregates* which are analytical/numerical constructs according to any number of equally arbitrary attributes that do not exist independently of our thinking about them, e.g. left-handed hockey goal keepers; (b) *voluntary associations* in which membership does not define one's identity in the sense that being a member of a social group does and to which an individualistic, contractarian approach is relevant, e.g. clubs, teams etc.; and, finally (c) *social groups* which are based upon the internal recognition of some commonality and whose sense of history and understanding of social relations and modes of reasoning, are at least partly constituted by their group identity. Needless to say, only social groups are deemed to qualify as candidates for group-differentiated rights. See Michael McDonald, 'Collective Rights and Tyranny' *University of Ottawa Quarterly*, 56, 1986; and Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', *Ethics*, Vol.99, No.2, 1989, pp.260-67.

[40] Note, also, that these same functions of contributing to an individual's sense of self-identity and self-definition may, arguably, also be ascribed to other groupings in addition to nations (e.g. families and religious groups) to whom we may not want to grant special rights. So even if the nation *does* perform these functions this may still be insufficient to adequately distinguish it from other groups – a point to which I shall return to at some length in the final section of this chapter. See, for example, Copp, pp.73-74; and Juha Raikka, 'On National Self-Determination: Some Problems of Walzer's Definition of Nation' in *Issues of Self-Determination*, ed. William Twining (Aberdeen: Aberdeen University Press, 1991), p.22.

On the one hand, then, the incorporation of subjective notions of identification, belonging and solidarity appear to make for a much more satisfactory definition of what a nation is, in comparison to the purely objective definition of nationhood outlined above. On the other hand, however, problems remain with a subjective approach. First, given that nationhood is a pre-requisite to possession of a right to secede, simply saying that a group constitutes a nation when the members of the group conceive themselves as such may still generate morally counter-intuitive results.

Consider, for example, two separate, identifiable groups – Turkish guest workers in Germany and inhabitants of the Baltic State of Lithuania. The subjective account asserts that if both groups conceive of themselves as a nation, acknowledge one another as members of the same group and/or identify themselves in terms of their membership of the group, then both have the right to secede and their claims are, once again, on a moral par with one another. But this is counter-intuitive: Turkish guest workers in Germany may have much to complain about, but whilst their complaints might be legitimate and their culture distinct from that of the people surrounding them, we would intuitively deny that such people possessed a right to secede, much less a right morally on a par with people such as Lithuanians or black Africans fighting colonial powers.[41]

Second, identification with, and sympathy for, others is neither a *necessary*, *exclusive*, *constant* nor a *binary* feature, i.e. individuals may feel *no* affiliation with any existing national group, identify *to varying degrees* with two or more existing nations, and/or *change* their national affiliations over time either to another national group or simply to no such group at all. Beginning with the claim that there are some individuals who have no attachment to any existing nation: it is claimed that in a world such as our own, increasingly porous borders and high levels of population mobility combine with advances in technology to render many of our formative influences global in nature.[42] These are the so-called 'cosmopolitans' – individuals who see themselves as belonging to a *global* culture and who feel no special need to be rooted in any one particular culture, nor associate with any one particular nation.

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[41] Lea Brilmayer, 'Secession and Self Determination: A Territorial Re-Interpretation', *Yale Journal of International Law*, Vol.16, No.1, January 1991, p.188 and p.191.

[42] See Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative' in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), p.103.

Indeed, clearly many individuals – particularly those in more well developed countries – *are* becoming increasingly globally orientated and less attached to one particular national identity or culture. This is not to deny that much of humankind still identifies itself in terms of national affiliation and membership of a nation (however the term is defined) therefore remains a fundamental element – or, more accurately, *one* of the fundamental elements – of their personal identity. However – irrespective of whether or not this national parochialism is a good thing, or should be abandoned in favour of a universal, non-exclusive global identity[43] – just because a considerable number of individuals continue to identify themselves in terms of their nationality, it does not follow from this that: the nation is the *only* (or even the *primary*) source of their identification; that they identify with only one, single nation (see below); or that nations should therefore be granted a right of secession to establish their own nation-State. Admitting that nations are important to the self-identity and self-definition of (many) individuals does not thereby establish that (only) the nation has a right to secede.

The second point – that sympathies for others is not an exclusive feature – signifies that individuals may identify with two or more national groups at the same time, and is related to the fact that individuals may change their national affiliations over time. Consider, for example, the case of first (and even latter) generation immigrants who may, to varying degrees, continue to feel some bond with their former home country while at the same time also identifying themselves as nationals of their new land. Additionally, indigenous peoples may to varying degrees identify themselves as Maori, Aboriginal and Sioux while at the same time also identifying as New Zealanders, Australians and Americans respectively. However, if individuals can belong to more than one nation, then this raises the possibility that nations may overlap and one nation may include others, in which case (given that nationhood is a prerequisite to possession of a right to secede) the theory may bestow conflicting rights, e.g. the Maori may exercise the right to choose independence from New Zealand, whereas New Zealanders may exercise it to determine that New Zealand not be divided.[44]

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[43] For a critique of Waldron's cosmopolitan thesis see, for example, Kymlicka (1995), p.85; and Kai Nielsen, 'Liberal Nationalism and Secession' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), p.109.

[44] See Beran's discussion of Margalit and Raz. Beran (1993), p.481.

Moreover, identification with others, a sense of belonging and the group solidarity that these create are all matters of degree. The members of some groups may identify with one another to a significant degree and, consequently, regard their membership of the group as fundamental to their sense of who they are and exhibit a high level of group solidarity. Other groups, however, may be much less cohesive and their members may identify with one another to a much reduced degree. The question is: given that solidarity is a necessary condition of what it is to be a nation, how much solidarity must a group exhibit in order for it to earn the status of being a nation? At precisely what point does the solidarity between the members of a group reach a sufficient level where we can say that the group has satisfied the necessary conditions of nationhood?[45] As Beran has noted:

> The sympathies people have for others tend to be a matter of degree, not of all or nothing. The people of the city of Leuven may have stronger sympathies for their fellow townspeople than for other Flemish. The Flemish may have stronger sympathies for other Flemish than for Walloons and the Belgians may have stronger sympathies for their fellow Belgians than for Europeans... The nation cannot be the group which has the highest degree of mutual sympathies because this would not even be the people of Leuven but individual families.[46]

One possible answer may be to think of nationhood, not as an all-or-nothing feature, but rather a matter of degree. This is the solution proposed by Copp who argues that a group may be *more* of a nation as *more* of its members identify to a *greater degree* with the same history and tradition, and accept others as members of the group.[47] Moreover, nations may be distinguished from other social entities such as families by a desire of the members of the nation to associate politically with one another in a State of their own. According to Copp, a group becomes more of a nation as: (a) more of its members desire that a political entity be formed that possesses the attributes of a State; and (b) "...geographical and territorial factors are such that it would be more feasible to create, or to continue, a State comprising to a greater degree all and only the members of the group as citizens."[48]

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[45] Note that this is exactly the same threshold problem encountered above with the objective criteria of linguistic, historical, cultural and ethnic distinctiveness.

[46] Beran (1993), p.482.

[47] See Copp, p.74.

[48] See Copp, p.75.

If, however, nationhood is both a prerequisite to possessing a right of secession *and* a matter of degree then there are two possible conclusions: either (a) a given group must exhibit a certain degree of nationhood in order to qualify for a right to secede; or (b) the right to secede is also a matter of degree, and thus the greater the degree of nationhood which a group exhibits the stronger their right to secede. The first option returns us to the threshold problem identified above, i.e. at exactly what point does a group exhibit a sufficient level of nationhood where we can therefore say that the group qualifies for a right to secede? Conversely, the second option is problematic, not only because it too raises the same threshold problem, but because we tend to think of rights as being binary features, not matters of degree (e.g. an agent either possess a right to freedom of speech or they do not).

This is not to say that a right cannot have limitations placed upon its exercise (e.g. the right to freedom of speech does not include the right to defame others), nor on occasion be overridden by other, more morally important considerations (e.g. in times of national emergency such as war one may loose or have restrictions placed upon the right to freedom of speech). But such things are to do with *what it is* to possess the right to freedom of speech, not *the degree to which* one possesses the right. Furthermore, including the desire for self-government as a criterion of nationhood is also problematic. Again, as Beran has noted: "[t]he people of Leuven desire and have self-government, their city council, but this does not [according to most peoples' understanding] make them a nation."[49]

2.4 WHY SHOULD THE STATE BE A NATION?

A. Introduction

Even if we put the question of *what* the nation is to one side, there remains the additional question of *why* nations should be the holders of a right to secede. Why should the mere fact that a group of people live a certain way, speak the same language,

[49] Beran (1993), p.483.

inhabit the same territory and/or conceive of themselves as a nation confer the right to institutionalise these common practices within the political framework of a State?[50]

Some theorists have claimed that there can be *no* question of trying to give rationally compelling reasons for people to have national attachments and allegiances. The fact is that people *do* have such attachments and allegiances and we should try to build a political philosophy which incorporates them.[51] But even if national identities *are* predominant, it doesn't follow from this that they therefore should be, that a predominant national identity is normatively required by political philosophy, or that nations should therefore be granted rights to political self-determination.[52] Just as nation is the predominant identity for nationalists, so gender is for feminists and class for Marxists.[53] So why, instead of creating nation-States, should we not, for example, draw political boundaries around economic classes, religious groups or sexes and create economy-States, religion-States or gender-States? What is it about the nation which means that it alone should be the main determinant in the drawing of political boundaries?

A second, equally unsatisfactory response is the claim that, unlike other types of group identity, national identity connects a group of people (i.e. the nation) to a geographical place – i.e. nation must have a homeland. The argument, then, is that while ethnic or religious identities may well have sacred sites, places of origin and so forth, in contrast to national identity, "...it is not an essential part of having the identity that you should permanently occupy the place."[54] Furthermore, it is also claimed that because the State, by definition, must exercise its authority over a specified geographical area this

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[50] Copp, p.65.

[51] Miller (1994), p.16. This also seems to be the view of Nielsen who argues that we should simply accept that a basic human need is the need to belong to a group and an individual's identity is determined by, and only makes sense in the context of, the identity of the group to which that individual belongs. See Kai Nielsen, 'Secession: The Case of Quebec', *Journal of Applied Philosophy*, Vol.10, No.1, 1993, p.30, p.31-32. Also see Kymlicka who believes that because national groups are here to stay we have no choice but to accommodate them (Kymlicka (1995), pp.185-86).

[52] See Freeman (1994), p.89.

[53] Freeman (1994), p.88-91.

[54] Miller (1994), p.20.

territorial aspect of nationalism makes nations ideally suited to serve as the basis of States.[55]

While it is important not to pre-empt discussion of the issues of territory and the territorial delineation of political authority in subsequent chapters of this thesis, it is evident that in its present form the above argument is, at the very least, incomplete. Even if the members of a nation have some sort of psychological (some, such as the French nationalist Maurice Barres,[56] might even say *metaphysical*) connection to a particular piece of territory, it is unclear what normative significance should be attached to such sentiments. Why does the fact that a group of people feel a particular attachment to a particular piece of territory therefore generate a right for that group to exclusive sovereignty over that territory?

It is tempting to say that, given that we have to divide the world up territorially into separate sovereign States, and that nations feel some sort of attachment to certain pieces of land and are often already resident on them, a good way of dividing the world into political units might therefore be to draw political boundaries around nations. However, things aren't quite as simple as this. Frequently the same piece of land is coveted by two or more nations,[57] and nationalism does not contain within itself the means by which these conflicts may be resolved.[58] Indeed, nationalism often creates and/or exacerbates such conflicts. Furthermore, membership of national communities is usually not inclusive nor exclusive within any given territorial unit, i.e. many national communities are geographically dispersed and share territory with others whom they regard as outsiders, or who regard themselves as outsiders.[59] Therefore, because nations generally don't break down into neat territorial packages, drawing political boundaries around national groups isn't the tidy solution which some might make it out to be.

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[55] See Miller (1994), p.20.

[56] See, for example, Maurice Barres, *L'Ame Francaise et la Guerre: L'Union Sacree* (Paris: Emile Paul, 1915).

[57] e.g. as is the case with the Israelis and the Palestinians over the West Bank.

[58] See Omar Dahbour, 'The Nation-State as a Political Community: A Critique of the Communitarian Argument for National Self-Determination' in *Rethinking Nationalism*, ed. J. Couture, K. Nielsen and M. Seymour (Calgary: University of Calgary Press, 1996), pp.334-36.

[59] Onara O'Neill, 'Justice and Boundaries' in *Political Restructuring in Europe. Ethical Perspectives*,

In this and the following section numerous arguments which attempt to demonstrate that national and political boundaries should, wherever possible, coincide will be critically assessed. These arguments may be divided into two distinct approaches, the first of which begins with the State as a political entity that promotes and protects morally important interests, and then attempts to demonstrate that the State would be more viable as an institution, and its functions better discharged, when the society that it regulates is a single nation. In contrast, the second approach is based upon a claim that membership of a nation is of fundamental importance to individuals,[60] and if the nation is to prosper then it must possess the control over its resources and destiny that only full political independence can provide.[61] Hence, whereas the former approach claims that the *State* should be a *nation*, the latter claims that the *nation* should be a *State*.

The former claim that the State is more viable as an institution and its functions better discharged when its citizens are members of the same national community, is premised upon the bonds that are said to exist between members of a nation. It is claimed that where a group of individuals are drawn from the same nation, the mutual trust and group solidarity that exists between those individuals either would not exist, or would exist to a quantitatively and/or qualitatively lesser degree, were these individuals drawn from two or more national groups. Thus, there is a strong causal connection between national similarity and mutual trust. Suppose, however, that we accept the claim that mutual trust and solidarity exists within national groups but not across them – which is itself a questionable claim.[62] Not only may there be other forms of community in addition to the nation which exhibit a *higher* degree of mutual trust and solidarity, but there is also the additional question of why this means that national and political boundaries should therefore coincide. In the discussion that follows two arguments

ed. Chris Brown (London: Routledge, 1994), p.73.

[60] And, *a fortiori*, the welfare of the individual cannot be divorced from the welfare of the nation of which they are a member.

[61] On the differences between these two approaches see Miller (1995), pp.82ff.

[62] See for example Dahbour and Barry who claim that there is no necessary connection between nations (which are defined by reference to ethnicity and kinship) and solidarity (which is the satisfaction of peoples' welfare, interests and needs). See Dahbour, p.337; and Barry (1983), p.135.

based upon the writings of David Miller which attempt to address these issues will be critically evaluated.[63]

B. The Nationalist Democratic Argument

Miller's first argument, which will be termed the *Nationalist Democratic Argument* (NDA), claims that there is a necessary connection between national homogeneity and democratic government.[64] Miller gives two reasons in support of this claim. First, claims Miller, States require citizens to trust one another if they are to function as democracies, i.e. citizens must be prepared to moderate their claims in the hope that they can find a common ground on which policy decisions may be made. For example, if I am to abandon a position about which I feel passionately in order to reach a workable compromise, then I will expect others to reciprocate either now or in the future.[65] Second, Miller argues that where a political community is comprised of two or more national groups, the mutual antipathies and hostilities between these groups are likely to be stronger than any suspicion or jealousy of the government, and so there will be no common interest in containing the power of government. Each group will have

[63] It should, perhaps, also be pointed out that in addition to these two 'instrumental' arguments, Miller also offers an 'intrinsic' defence of nations as ethical communities based upon a defence of ethical particularism. Put simply, Miller's argument is that members of a nation have special moral obligations to one another which they do not have to individuals who are members of other nations – much in the same way that I have special moral obligations to members of my family which I do not have to other individuals who are not members of my family (Miller (1995), Chap 3). Other theorists have, however, questioned this defence of nations. For example, Moore argues that the intrinsic and instrumental justifications tend to pull in opposite directions – especially in so far as a normative theory of secession is concerned. See Margaret Moore, 'Miller's Ode to National Homogeneity', *Nations and Nationalism*, Vol.2, No.3, 1996. On the other hand Barry suggests that the special moral obligations which one owes to one's co-nationals are the result of some moral relationship other than nationalism but which is more-or-less co-extensive with a shared national identity. See Barry (1996), p.431. Moreover, even if, as Miller suggests, we owe special obligations to our co-nationals which we do not owe to others, the same may be said of other morally significant groupings such as families, clubs, religious groups and so forth. Nations may, as Miller suggests, be ethical communities but they are not the only example of such a community, and so this 'fact' on its own is insufficient to single out the nation as the sole candidate for a right to secede – a point which shall be investigated at length later in this chapter.

[64] Miller's analysis in many ways both reflects, and builds upon that of other thinkers including J. S. Mill, pp.363-64; and Ernest Barker, *National Character and the Factors in its Formation* (London: Methuen, 1948). Both Mill and Barker believed that a nation-State is best able to sustain free institutions. Similarly Ackerman seems to suggest that in order to engage in fruitful dialogue citizens must agree upon the principle of their discourse and share some sort of social and cultural background. See B. A. Ackerman, *Social Justice in a Liberal State* (New Haven: Yale University Press, 1980), p.72. Also see Tamir's brief but informative discussion of Mill and Ackerman (Tamir, pp.128-29).

[65] Miller (1995), pp.96-98.

an interest in capturing and maintaining control of government, and even increasing its powers, in order to improve its position *vis-à-vis* the other national group(s).[66]

Within the secession debate we may distinguish two common responses to the NDA. First, it is claimed that much of the available empirical evidence suggests that there is *no* necessary connection between national homogeneity and democratic government. For example, the twelve non-Baltic republics are no more democratic than the former Soviet Union which they replaced, despite now being more nationally homogeneous.[67] Similarly, one may also point to immigrant societies such as the United States, Canada and Australia which exhibit high levels of pluralism but are nonetheless thriving liberal democracies. Indeed, the fact that members of the diasporas in these countries have generally chosen established democratic norms to articulate their community's interests and concerns may arguably have strengthened, rather than undermined, the institution of democracy in these States.

Second, it is also pointed out that because many national groups not only place *no* value upon democratic rights and procedures, but their illiberal and undemocratic attitudes and behaviours are a part of what makes them distinct nations in the first place, increasing a State's degree of national homogeneity will not necessarily ensure that that State is a democratic one. The fact that one's life is lived within a political unit populated and governed solely by one's fellow nationals, is no guarantee that one will be governed in a democratic manner and enjoy the individual rights associated with liberal-democratic government.[68] A fully self-governing, homogenous nation-State may still be a tyranny.[69]

These objections, both of which appear to make valid points, together suggest that national homogeneity is not a *sufficient* condition for democratic government. However, Miller's argument, at least as I understand it, seems to be that national homogeneity is a *necessary* condition for democratic government, i.e. if a State is to be governed democratically then it must be nationally homogenous, although the fact that

[66] Miller (1995), p.98.

[67] Amitai Etzioni, 'The Evils of Self-Determination', *Foreign Policy*, 89, 1992, pp.23-24.

[68] See Thomas Pogge, 'Cosmopolitanism and Sovereignty', *Ethics*, Vol.103, No.1, 1992, p.75.

a given State is nationally homogenous does not *necessarily* mean that it will therefore be democratic. In other words, national homogeneity is a prerequisite for democratic government not a cause or guarantee of it. Miller explains:

> ...to the extent that we aspire to form a [deliberative] democracy in which all citizens are at some level involved in discussion of public issues, we must look to the conditions under which citizens can respect one another's good faith in search for grounds of agreement. Among large aggregates of people, only a common nationality can provide the sense of solidarity that makes this possible. Sharing a national identity does not, of course, mean holding similar political views; but it does mean being committed to finding terms under which fellow-nationals can agree to live together.[70]

Miller explicitly rejects the claim that *complete* national homogeneity is a prerequisite to democratic government.[71] This appears to be a sensible assertion as not only does such a claim appear implausible, but it would also render democratic government an ideal largely unattainable in the real world. This is because, as was noted above, many national communities are geographically dispersed and share territory with others whom they regard as outsiders, or who regard themselves as outsiders.[72] Short of either creating a series of discontiguous enclaves or instigating a programme of so-called 'ethnic cleansing', complete national homogeneity within a single State will generally prove to be elusive.[73] If we eliminate both of these options from consideration – the former because, at least in some cases, it may be impractical[74] and the latter because it is morally impermissible – then it seems that even after any redrawing of political boundaries to match national ones, the vast majority of States will

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[69] Compare with George, p.73; and Philpott, p.372.

[70] Miller (1995), p.98.

[71] Miller (1995), p.98.

[72] O'Neill, p.73.

[73] See, for example, Freeman (1998), p.22. Assuming, of course, that we accept as given the conventional territorial delineation of political authority where a State's authority is exercised over a specified geographical area (an assumption which Miller also appears to accept).

[74] In a recent article Barry Smith points out that numerous existing States are geographically non-contiguous and thus have a part of their territory surrounded by the territory of another State. See Barry Smith, 'The Cognitive Geometry of War' in *Current Issues in Political Philosophy*, ed. Peter Koller and Klaus Puhl (Vienna: Hölder-Pichler-Tempsky, 1997). Typically, however, the examples of non-contiguous regions cited by Smith constitute a relatively small proportion of the State's overall territory and, thus, demonstrate that a State may tolerate a *certain degree* of territorial disjointedness without suffering any notable negative affects. However, because the degree of territorial dis-contiguity required to achieve total national homogeneity is in many cases likely to be much higher than that exhibited by the States mentioned by Smith, it is far from certain that such a policy would not, at the very least, pose serious problems for the effective functioning of States.

continue to exhibit some degree of national pluralism and, hence, will remain unable to satisfy the necessary pre-conditions for democratic governance.

Presumably, then, Miller's claim is that there is a *positive relationship* between national homogeneity and democratic government, i.e. the more nationally homogenous a given State is the greater the degree to which the necessary pre-conditions for democratic government will be met. Thus, by re-drawing political boundaries in a manner that maximises a State's degree of national homogeneity, we will thereby maximise the mutual trust and solidarity amongst that State's population which democracy requires in order to function effectively.

Buchanan, while dismissive of the claim that the nation should be accorded the degree of importance which theorists such as Miller want to grant it, seems to agree that in order to function effectively democracy requires a 'minimal community' whose members have "...*enough* in common to be able to engage in meaningful participation in rational, principled political decision-making."[75] Where this minimal community is lacking, then unabridgeably disjoint values and ways of conceptualising the social world will prevent individuals from together articulating even a minimal good that is common to both groups.[76] Thus, despite the fact that both groups may have an equally strong commitment to democracy such that, were they each to have their own State then these States would both be properly functioning democracies, where they inhabit the *same* State their widely divergent values and ways of seeing the world preclude that State from being democratic. Given that these differences are unlikely to be diminished over time by members of the two groups interacting with one another then, *ceteris paribus*, Buchanan concludes that these two groups should each be granted their own State to reflect the fact that there are two political communities not just one.[77]

Suppose we agree that democratic government requires the sort of minimal community described by both Miller and Buchanan, i.e. in order for a State to be democratic its citizens must first enjoy a substantial degree of mutual trust, and have

[75] Allen Buchanan, 'Democracy and Secession' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), p.23.
[76] Buchanan (1998), pp.23-24.
[77] Buchanan (1998), p.24.

enough in common with one another to be able to engage in rational dialogue and to articulate a mutually beneficial conception of the common good. Even if we accept this claim as valid, the empirical evidence is not wholly supportive of Miller's claim that multi-national States are incapable of constituting such a community. Numerous States are thriving liberal democracies despite – some may say *because of* – the fact that they include a plurality of national groups. New Zealand, for example, in addition to the dominant European, or *Pakeha*, majority, also includes a significant indigenous population in the form of the Maori which would likely qualify as a distinct nation on both the objective and subjective definitions of the term given above. Similarly, Canada, in addition to a plurality of distinct indigenous groups such as the Innuit, also contains a territorially concentrated, secession-inclined, culturally and linguistically distinct minority in the form of the Quebecois. Yet, despite their multi-national status, both New Zealand and Canada nonetheless fulfil the liberal democratic ideal.[78]

Miller's response to counter-examples such as New Zealand and Canada is to claim that a common sentiment of nationality *can* co-exist with linguistic and other cultural differences, and to draw a distinction between *multi-communalism* and *multi-nationalism*.[79] Countries such as New Zealand, Canada, Belgium and Switzerland, claims Miller, are *not* multi-national but, rather, multi-*communal* (i.e. through the promulgation of an encompassing, supra-national identity that embodies the divergent cultures and historical traditions of their various constituent sub-national communities, they have managed to create a *trans-communal* sense of national identity).[80] Thus, while the citizens of these States may possess a strong communal consciousness with respect to their particular linguistic or cultural community, overlying this is an even stronger sense of patriotism and commitment to the larger, State.[81] In the case of Switzerland, for example, Miller notes that:

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[78] Miller acknowledges that Quebec apparently qualifies as a separate nation (or is likely to). See Miller (1995), p.95.

[79] Miller (1995), p.98.

[80] Miller acknowledges as much, noting that "...American national identity has ceased to have any marked ethnic content: ethnic groups naturally think of themselves as having hyphenated identities (Irish-American, Asian-American, etc.) which is possible only where the second term carries a meaning that transcends ethnic differences." Miller (1995), p.136.

[81] Jay Sigler, *Minority Rights: A Comparative Analysis* (Westport: Greenwood, 1983), pp.188-92.

> ...a national identity was quite deliberately fostered in the course of the nineteenth century, a process bearing all the usual hallmarks of nation-building – myths of origin, the resurrection of national heroes like William Tell, and so forth – with the result today that the Swiss share a common national identity *as Swiss* over and above their separate linguistic, religious and cantonal identities.[82]

Miller, along with Margalit and Raz, rejects majoritarian LD theories of secession as question-begging, i.e. trying to solve issues of self-government through democratic means simply begs the question of what the relevant democratic unit is – a question which cannot, itself, be democratically answered.[83] As an alternative to the LD model these three theorists propose that issues of self-government be decided by drawing political boundaries around nations rather than self-defining democratic groups. If, however, this alternative theory is to avoid the same 'question-begging' objection that is apparently fatal to LD theories, then nations *must* be separate from the political processes of group-identity formation, and have their source(s) in some form of pre-political experience.[84] On the other hand, however, Miller *also* wants to claim that States such as Switzerland are not hostile to the thesis that national homogeneity is a necessary condition for democratic government because they *have* created a national identity through political processes.

This places Miller in something of a dilemma: if we adopt a *Naturalist* or *Primordialist*[85] account of nationalism where nations are pre-political entities, then the Swiss and others *can't*, as Miller suggests, have created a national identity to match the boundaries of their State. Rather, there must have been a *pre-existing* Swiss national identity *prior* to the Swiss State. In other words Miller's objection to the counter-examples of States such as Canada and New Zealand to the NDA won't hold – they cannot have created a national identity because national identities, by definition, exist prior to political community.

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[82] Miller (1995), pp.94-95.

[83] See Miller (1995), pp.111-12; and Margalit and Raz, p.455.

[84] See Dahbour, pp.328-29.

[85] See, for example, Anthony Smith, *The Ethnic Origins of Nations* (Oxford: Basil Blackwell, 1986); and John Armstrong, *Nations Before Nationalism* (Chapel Hill, University of North Carolina Press, 1982).

Alternatively, Miller may adopt a *Modernist*[86] account of nationalism which instead sees national identities as formed contingently through particular political occurrences (i.e. our national identity is constituted by choosing to see ourselves in certain ways, *not* by accepting or giving into a pre-given identity[87]). This will allow Miller to deal effectively with the counter-examples of States such as New Zealand and Canada to the NDA by claiming that they are multi-communal rather than multi-national. However, it does so at the price of both blurring the sharp distinction between nation and State which is so important to Miller's theory, and running headlong into the 'question-begging' objection that led to the rejection of LD theories in the first place. Put simply, we can't, as Miller suggests we do, begin with an account of nations in order to determine what kinds of political institutions and boundaries are justifiable, when those same institutions and boundaries will to a significant degree determine what nations exist in the first place.[88] In summary: either Miller concedes the political nature of national identities – thereby forfeiting the claim of nations to self-determination[89] – or he maintains that nations exist prior to, and independent of, political community, in which case he still has to explain why the examples of Canada and New Zealand are not hostile to the NDA.

Furthermore, given that all sorts of different national groups can, and do, share a commitment to democracy, suppose two or more distinct nationalities, each of whom share an equal commitment to democratic government and have similar (or at least not widely divergent) values and ways of looking at the world, are combined together in a single State. Why should this State be any less democratic than a series of independent States each populated by a separate national group? Indeed, as was pointed out earlier, this seems to be exactly what has occurred in States such as New Zealand and Canada which are both multi-national *and* democratic.

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[86] See, for example, Peter Alter, *Nationalism* (London: Edward Arnold, 1989); Benedict Anderson, *Imagined Communities* (London: Verso, 1991); John Breuilly, *Nationalism and the State* (Chicago: University of Chicago Press, 1982); William McNeill, *Polyethnicity and National Unity in World History* (Toronto: University of Toronto Press, 1986); Hugh Seton-Watson, *Nations and States: An Enquiry into the Origins of Nations and the Politics of Nationalism* (London: Methuen, 1977); and Walker Connor, *Ethnonationalism: The Quest for Understanding* (Princeton: Princeton University Press, 1994).

[87] Dahbour, p.328.

[88] See Chandran Kukathas, *Nationalism and Nationality*[forthcoming], Chap 10; and Dahbour, pp.327ff.

[89] Dahbour, p.330.

Miller's response is to claim that where two nations inhabit the same State, their divergent interests combined with mutual antipathy and mistrust, will undermine each group's commitment to democracy by creating an incentive to capture and misuse the power of government for its own benefit. However, rather than weakening democratic government social pluralism may actually *strengthen* it, i.e. a pluralistic array of groups within a single State may serve to keep the government and its allies in check, as each group will have an interest in ensuring that no other group captures the government and misuses its power to further its own group-specific interests.[90]

Moreover, while Miller may well be correct in asserting that nationality provides the minimal community required by democracy, it does not follow from this that the nation is the *only*, nor the *best*, example of such a community. Sentiments of mutual trust and consensus regarding important values and ways of conceptualising the social world may also be exhibited by, say, religious communities and life-style groups to at least the same degree as they are by nations. Here, however, Miller may reply that the nation is defined as the form of community that displays a sufficient degree of inter-personal trust of the sort necessary for effective liberal-democratic governance. Thus, if, say, the members of a religious community exhibited a sufficient degree of mutual trust to function effectively as a liberal democracy then they would qualify as a nation and, *a fortiori*, a right of secession.

This would be an effective means of countering the objection that nations are not the only means of securing the conditions necessary to the flourishing of liberal-democratic institutions and practices. However, it would also be to: (a) abandon the objective and subjective hybrid definition of nationality preferred by Miller; and (b) extend the status of nationhood – and, thus, a right of secession – to a variety of overlapping groups such as religious communities, voluntary associations, social movements and lifestyle collectivities that may otherwise be excluded under a subjective/objective definition. Consequently, because individuals may belong to more than one group capable of functioning as a democracy – e.g. a religious community may contain members from

[90] For theorists who believe that divisions between national groups and their desire for an internal life of their own may serve as a check against the abuse of State power see Lord Acton, 'Nationalism' in *The History of Freedom and Other Essays*, ed. J. Figgis and R. Laurence (London: Macmillan, 1922), pp.285-90; Alfred Zimmerman, *Nationality and Government* (London: Chatto and Windus, 1918); and Kelvin

one or more voluntary associations – such an approach would not only fail to distinguish between different holders of a right to secede, it may also bestow conflicting rights. To continue the previous example: members of the voluntary association may choose political independence whereas others in the religious community may opt to remain within the parent State. To attempt to avoid this dilemma by simply granting a right of independent Statehood to *any* group capable of enduring as a liberal democracy and whose members want to secede – e.g. members of the voluntary group may secede to create a new State while other members of the religious community may remain within their parent State – is to render the Nationalist theory indistinguishable from the LD theory.

In conclusion: taken together these arguments demonstrate that the NDA is, at best, incomplete. At the very least, proponents of the NDA such as Miller seem to have some extra work to do. Not only must they adequately explain counter-examples such as New Zealand and Canada which tend to suggest that States *can* be both democratic and multi-national, but the question still remains why the nation is the only or the best example of the type of community required by democracy.

C. The Co-operative Effort and Distributive Justice Argument

Miller's second argument for why nations should have an exclusive right of secession concerns the political consequences of solidarity and cultural homogeneity, and is premised upon the claim that States are more likely to function effectively when they 'embrace'[91] a single national community. Briefly, Miller's argument is that "...a viable political community requires mutual trust, trust depends on communal ties and nationality is uniquely appropriate here as a form of common identity."[92] The argument is made in relation to both the provision of certain collective goods/benefits

Knight, 'Miller's Silence on Bureaucracy', *Nations and Nationalism*, Vol.2, No.3, 1996, p.438.

[91] The phraseology is Miller's (Miller, (1995), p.90).

[92] David Miller, 'The Nation-State: A Modest Defence' in *Political Restructuring in Europe. Ethical Perspectives*, ed. Chris Brown (London: Routledge, 1994), p.143. Also see David Miller, 'In What Sense Must Socialism be Communitarian' in *Socialism*, ed. Ellen F. Paul and Fred Miller (Oxford: Basil Blackwell, 1989), p.60.

and schemes of re-distributive justice, both of which are taken to produce a state of affairs that is superior to that which would obtain in their absence.[93]

There are two, inter-related claims here: (a) that the ties of community present within a nation are an instrumentally effective means of overcoming collective action problems endemic in the provision of certain collective goods; and (b) that the bond that exists between individuals who share a common nationality provides the requisite sense of mutual obligation that is essential if schemes of re-distributive justice are to function effectively, or at all. Both claims are *teleological*, i.e. there is nothing inherently valuable in nations, rather, they are an instrumentally effective means of providing the sociological conditions which the successful operation of these two types of schemes require.[94]

Beginning with the former claim: Miller gives two examples where the voluntary contributions of individuals to a certain scheme produces an important benefit, with the result that the state of affairs produced under that cooperative scheme is judged to be superior to the state of affairs that would obtain were the benefit not produced at all.[95] Difficulties arise, however, when we consider that contributing to the scheme will usually have costs associated with it. Moreover, claims Miller, in order for people to contribute and accept the costs that this will impose upon them, they must first 'trust' other individuals to reciprocate and contribute themselves.[96] Hence, the absence or diminishment of this trust will have a correspondingly negative effect upon the level of contributions to the scheme, with the result that the benefit will not be produced to

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[93] One could, of course, question the social utility of such practices and the institutions which have grown up around them. The policy of re-distributing wealth to less well-off members of society in what has come to be known as the 'Welfare State' is a particularly contentious issue. For present purposes, however, such issues may be put to one side so that the question of whether or not there is a positive relationship between the nation (and national homogeneity) and these practices of wealth re-distribution may be more fully explored.

[94] As Miller states: "...national identities...perform such valuable functions that our attitude, as philosophers, should be one of acquiescence if not positive endorsement." Miller, 'In Defence of Nationality', p.22.

[95] The role of mutual trust in creating a strong and stable State is also stressed by Barry who argues that a culturally homogenous State makes the provision of public goods more feasible and their funding from tax revenues more equitable due to the similar tastes of individuals. See Barry (1983), pp.144-45.

[96] i.e. this trust is a necessary, not merely a sufficient, condition for contribution to the scheme. Miller (1995), p.91.

quantitatively and/or qualitatively the same degree (if at all) thus resulting in a sub-optimal state of affairs.

Miller's first example of such a scheme concerns the provision of a clean and healthy environment. While the State can intervene directly in order to produce such an environment (e.g. by fining polluters), in general it will have to rely upon the voluntary compliance of citizens with certain rules that it proposes (e.g. not to litter in public places). However, because adhering to these rules will often impose costs upon individuals, Miller argues that in order to accept any such cost people must first be relatively confident that others will reciprocate by also adhering to the rules. The same is true, claims Miller, of a scheme of special grants or concessions to particular groups within the population (e.g. financial support to an industry severely disadvantaged by changes in the terms of trade). These dispensations are "...made on the understanding that other sections of the community would qualify for similar favourable treatment in the event that they too faced new and unforeseen difficulties."[97] Therefore a necessary pre-condition for the successful operation of such a scheme is a degree of confidence that the group to which you are now granting aid will give you its reciprocal assistance when it is your turn to ask for it.[98]

Secondly, Miller considers schemes of social justice which involve the redistribution of wealth to those who, on their own, are unable to provide adequately for their needs. It is possible, indeed quite likely, that because of their relatively disadvantaged status, many of the people who benefit from such re-distributive practices will never be in a position to themselves contribute to the well-being of others. So the issue here is not so much 'trust' as it was above but, rather, a feeling of empathy that leads individuals to recognise certain obligations of redistributive justice to one another.[99] Once again, to

[97] Miller (1995), p.91.

[98] Note, however, that Miller restricts his discussion of collective action problems in the provision of certain collective goods and services to those that obtain *within* a State's boundaries. In contrast, as Caney has recently pointed out, some of the most pressing collective action problems arise with *global* issues (e.g. environmental pollution). Moreover, "...giving nations statehood will clearly produce more states than would exist in a world in which some states are multinational. And the more actors there are, the more difficult it will be to secure international agreement. Consequently, granting nations self-government would worsen the prospects of solving some collective action problems." See Simon Caney, 'Self-Government and Secession: The Case of Nations', *Journal of Political Philosophy*, Vol.5, No.4, 1997, p.357.

[99] Miller (1995), p.93.

the degree that this sense of obligation is lacking the scheme will suffer a corresponding loss of support with the result that a sub-optimal state of affairs will obtain. Thus, the second problem for the State is to mobilise its citizens to fulfil duties to other citizens, particularly duties of social justice based upon practices of redistribution from which they are unlikely to benefit directly.[100]

Miller concludes that in order to overcome these two difficulties the citizens of a State must constitute a *community*. In other words, they must feel themselves to share a common identity that carries with it a shared loyalty[101] – both to one another and to the community as a whole – that increases each member's confidence that other members will reciprocate their own cooperative behaviour. Additionally, the sense of solidarity and common destiny that occur as a result of this shared identity must then generate a sense of social duty to act for the common good of the community and to assist other members who are in need. The problem for the State is how to create and maintain such a community, when the large size and geographical distribution of its citizenry will in most cases mean that it cannot possibly enjoy the kind of community that relies on kinship or face-to-face interaction.[102]

At this point it is claimed that because the attributes of community are already present within the nation, where the State and the nation are co-extensive the requirements of community will therefore be met to a higher degree than were the State's citizens drawn from a number of distinct national groups. Thus, because nation-States are better able to fulfil the requirements of distributive justice and provide collective goods that require the voluntary cooperation of individuals for their production, as far as is possible State boundaries should be re-drawn to match national boundaries. Conversely, in those States lacking a common national identity (e.g. Nigeria or Pakistan) which are little more than umbrella organisations that hold together a number of different ethnic or national groups, politics at best takes the form of group bargaining

[100] Miller, 'In Defence of Nationality', pp.21-22.
[101] Miller, 'The Nation-State: A Modest Defence', p.142.
[102] Miller, 'In Defence of Nationality', p.22.

and compromise, i.e. mutual trust and a sense of obligation exist *within* each national group but not *across* them.[103]

D. Responses to the Co-operative Effort and Distributive Justice Argument

A common response to this line of argument has been to claim that there is reason to doubt whether nationalism facilitates programmes of re-distributive justice, i.e. there is nothing in nationalism that necessarily mandates a commitment to social or economic justice and many nationalisms place no emphasis upon such things.[104] Indeed, privileged minorities have often appealed to nationalism to counter-act the distributive impulse and persuade the worse-off to moderate their demands.[105] As Buchanan points out:

> ...nationalism (rather than some varieties of it) has no particular penchant for distributive justice...it has in fact often been used to block redistribution, and...the political unity nationalism achieves can be and often is used for quite different and in some cases downright evil purposes...[106]

At best, however, this demonstrates merely that the fact that one lives in a State populated and governed exclusively by the members of one's own national group, is no guarantee that one will enjoy the benefits provided by a programme of re-distributive justice. While undeniably correct, this establishes only that national homogeneity is not a *sufficient* condition for the creation and maintenance of programmes of re-distributive justice. Miller's argument, on the other hand, seems to be that national homogeneity is *necessary*, not a sufficient, condition for such programmes.[107] So while these claims may well be correct, they also seem to be irrelevant to Miller's analysis.

As in the case of the NDA, it is also claimed that much of the available empirical evidence appears to contradict Miller's claim that nationally homogenous States are

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[103] Miller (1995), pp.92-93.

[104] On this point see Dahbour, p.338.

[105] See Brighouse, p.392; and Allen Buchanan, 'What's So Special About Nations?' in *Rethinking Nationalism*, ed. J. Couture, K. Nielsen and M. Seymour (Calgary: University of Calgary Press, 1996), p.306.

[106] Buchanan (1996), p.306.

[107] See, for example, Miller (1995), p.91.

better able to meet the requirements of distributive justice. Once again, multi-national States such as Canada, Belgium and Switzerland all, to varying degrees, sustain effective systems of public welfare. Furthermore, as Brighouse points out: "[t]he most assimilationist national identity in the world, that of the 'American,' dominates the culture of a country which has, among advanced industrialised nations, singularly failed to establish robust economically egalitarian institutions."[108]

To these objections Miller gives two responses: (a) Belgium, Canada and Switzerland work as they do partly because they are not simply multi-national, but have cultivated common national identities alongside communal ones, and partly because they have developed institutions (federalism, de-centralization) to ensure that each community has its interests protected against incursions by the rest;[109] and (b) as far as social justice is concerned, it is not only the 'strength'[110] of a national identity that matters, but also its character (i.e. the extent to which the nation conceives of itself along solidaristic or individualistic lines). Where, as in the case of the United States, the identity of the nation is conceived of in individualistic terms, practices of wealth re-distribution are less likely to be viewed as legitimate.

Miller's former response has already been dealt with above in relation to the NDA, while the latter response only serves to narrow the scope of the type of national identities which provide the requisite form of community for schemes of re-distributive justice (i.e. national homogeneity is not enough, rather, the nation must be of a specific, non-individualistic character). Moreover, in addition to these two replies to Miller's counter-argument, there is also the additional question of whether there may be other forms of community in addition to the nation (e.g. religious or economic communities) which fulfil the requirements of community to a higher degree then does the nation.

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[108] Brighouse, p.391. In support of this claim Brighouse quotes Andrew Shapiro, *We're Number One* (New York: Vintage Books, 1992); Edward N. Wolff, *Top Heavy: A Study of the Increasing Inequality of Wealth in America* (New York: Twentieth Century Fund, 1995); and Nancy Folbre, *The New Field Guide to the U.S. Economy* (New York: The New Press, 1995). Brighouse claims that the successful establishment and maintenance of welfare States is largely dependent upon the creation of *class* (as opposed to national) solidarities and the ability to build class coalitions through the design of policy, and it is open question whether a common national identity facilitates the establishment of these coalitions (Brighouse, p.391).

[109] Miller (1995), pp.94-96.

[110] Miller's use of the term 'strength' here appears to refer to the degree to which a national identity is adhered to by a State's population and/or the degree of national homogeneity exhibited by a State.

Trust, as Miller suggests, may well be important in overcoming collective action problems, but what reason is there to suppose that nationality is the only or the best form of such trust?[111]

Anticipating this objection Miller claims that nations are different from other, alternative forms of community because they are 'encompassing'[112] communities. Moreover, the encompassing character of the nation not only makes it distinct from other forms of community, but also superior to them as a basis for political society. A similar argument is made by Nielsen who claims that the nation provides a uniquely suitable basis for political communities because of its ability to 'encompass' other forms of identity by integrating and providing a context of choice in which they may operate.[113] Miller, on the other hand, seems to have in mind something different when he describes nations as 'encompassing communities.' For Miller the encompassing nature of nations stems from an aspiration to "...draw in everyone who inhabits a particular territory."[114] Thus, in contrast to other forms of community which tend to define themselves exclusively, Miller believes that national identity has a malleable character that enables it to embrace the entire population of a particular territory.[115] Indeed, argues Miller, nationalism becomes self-defeating if it is not accommodating as it would be 'perverse' for a nation seeking self-determination to exclude others with whom it shares a particular territory:[116]

> Suppose we are members of a national community forming the dominant group in the territory we aspire to control, but that we share it with a minority group who have much in common with us, but who differ in one respect – religion, say. Unless our religion is crucial to our identity [and Miller believes that with most nations no single feature is likely to be crucial]...we have good reason to de-emphasize this feature, and to stress instead, as a basis of unity, those cultural traits that we already

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[111] This point is also made by Dahbour and Caney (Dahbour, p.318; Caney (1997), p.357).

[112] See Miller (1995), p.92 and 'The Nation-State: A Modest Defence', p.143. The term is borrowed from Margalit and Raz.

[113] See Nielsen (1998). This claim will be returned to shortly.

[114] See Miller (1995), p.92 and 'The Nation-State: A Modest Defence', p.143.

[115] As an example of an alternative, more rigid type of community, Miller gives the example of religious communities which require adherence to a particular religious doctrine. See Miller (1995), p.92, 'The Nation-State: A Modest Defence', p.143; and 'In Defence of Nationality', p.25.

[116] See Miller (1995), p.92, and 'The Nation-State: A Modest Defence', p.143.

> share with the minority. To the extent that we succeed in doing so, we can form a territorial community in whose self-determination we can all share. From this springs mutual trust.[117]

The idea, then, is apparently to create a *new* national identity that includes everyone within the State's sphere of territorial sovereignty by re-shaping the identity of the dominant nation. Moreover, to the extent that the majority nation is able to de-emphasise those elements of its identity which set it apart from the national minorities which with it shares a certain territory, the requirements of community will be met.

Groups such as the Albanian Kosovars and the Rwandan Tutsis, however, may have some problems accepting Miller's example as indicative of the treatment usually meted out to national minorities in multi-national States. Indeed, Miller's example is very much a best-case scenario, where the larger, more powerful majority decides to 'do the decent thing' and accommodate the smaller, weaker minority. Yet, as many national minorities will affirm, accommodation and reconciliation are not always the norm in multi-national States. Rather than going out of its way to try and accommodate outsiders with whom it shares a particular territory, the dominant nation may instead simply reason that instead of changing its identity to match that of the minority, the onus of change is upon the minority. To use Miller's example: rather than de-emphasising the feature of religion, the majority nation may simply insist that members of the minority convert to its religion. Moreover, to the extent that a minority is unprepared to change its identity to match that of the majority, the majority may choose to exclude the minority – either by simply neglecting them, or through more extreme measures such as repression or expulsion.[118]

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[117] Miller (1995), p.92.

[118] Of course, as Caney points out, the fact that *some* nations aim to repress those who are not members of their community fails to establish that *all* nations are therefore tyrannical. See Caney (1997), p.364. Undoubtedly Caney is correct – not all nationalist leaders are budding Milosevics or Zhirinovskys. Note, however, that this fact is insufficient to save Miller's characterisation of nations as uniquely encompassing communities. Yes, many national groups are accommodating towards outsiders and will not seek to oppress or expel them as Milosevic has done to the Albanian Kosovars and the Rwandan Hutus to the Tutsis. However, the existence of liberal, accommodating nationalisms does not demonstrate that nationalism is *necessarily* an encompassing form of community (it is equally true that it may be unencompassing), nor does it show that nationalism is any more encompassing than other, alternative forms of community.

In fact Miller *does* admit, not only that some groups may prefer to exclude rather than accommodate national minorities,[119] but that in other cases the aspiration to accommodate national minorities may simply not be achievable because of fundamental differences between its and the majority's identity.[120] For example, claims Miller, both groups may include as part of their historical self-understanding, their separation from, and antagonism towards, the other.[121] Alternatively, they may each take a different religion as a constitutive component of their national identity.[122] Nevertheless, it is clear that Miller is working with a very benign, conciliatory form of nationalism.[123] Unfortunately, however, many national identities are not nearly so obliging towards outsiders and instead include a belief that they are superior to others in a way that justifies overriding their rights.[124]

Therefore, even if nationalism *can* be accommodating towards outsiders, it is equally true that it is often extremely exclusive and *un*accommodating. Moreover, there is nothing in Miller's analysis which establishes that the nation exhibits a greater tendency to accommodate non-members than other, rival forms of community. So even if we accept Miller's claim that a viable political community requires the sort of mutual trust and inter-personal sense of duty that only communal ties can provide, Miller fails to establish that the nation is necessarily superior to other, alternative forms of community in the provision of these ties.[125]

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[119] Miller, 'The Nation-State: A Modest Defence', p.143.

[120] Miller (1995), p.92, 'The Nation-State: A Modest Defence', p.143, and 'In Defence of Nationality', p.27.

[121] See Miller, 'The Nation-State: A Modest Defence', p.156. Also see David Miller, 'Secession and the Principle of Nationality' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), pp.66 and p.72.

[122] Miller, 'The Nation-State: A Modest Defence', p.156. N.B. Miller's use of religion as an example of an irreconcilable difference in this context appears rather odd, given that in the passage quoted above and elsewhere (see Miller (1998), p.71) he explicitly claims that two groups *may* adhere to different religions but yet nonetheless share the same national identity.

[123] See Buchanan (1996), p.306.

[124] See Brighouse, p.388.

[125] Also note that Miller's description of nations as encompassing communities conflicts with an additional argument he makes for the re-drawing political boundaries to match national ones, premised upon the claim that national cultures can only be adequately protected within nation States. Put simply, Miller argues that because national cultures are made up of elements which have a very public dimension (e.g. the architecture of public buildings, the content of education, the character of television and film etc) this means that they must be subject to State control because the actions of economically self-interested individuals will often be insufficient to ensure that these elements express and reproduce the nation's culture. Moreover, the State must be a nation-State because where a State exercises its authority over two

2.5 WHY SHOULD THE NATION BE A STATE?

A. Introduction

The next task is to consider the claim that political boundaries should be re-drawn to match national ones because the welfare of nations requires that they possess the control over their resources and destiny that only full political independence can provide. The argument is distinct from the two previous arguments in two important respects. First, the issue is not the benefits that nations and national homogeneity may bestow upon the State but, rather, the benefits that Statehood may bestow upon the nation.[126] Second, the two previous arguments pitted nationalism *against* liberalism by claiming that if a political community is to be both democratic and viable then it cannot be based solely upon the liberal principle of voluntary association (i.e. a social contract between rational, self-interested fails to establish the minimal trust and sense of obligation necessary for democratic government, the provision of collective goods and programs of re-distributive justice).[127] Conversely, the following argument claims that nationalism is not only consistent with liberalism, but is actually required by it.

B. The Nation as a Context of Choice and a Constitutive Component of Individual Identity

In looking at the alleged connection between liberalism and the claim that nations should have a right to independent Statehood, a good place to start is with Kymlicka's theory of minority rights which, for reasons explained above, will be dealt with in

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or more national groups, the dominant group will have an incentive to impose its culture on the weaker groups and any measures adopted to preserve the national identity of one group will usually be resisted by adherents of the other(s) – a claim which has already been questioned above. But Miller can't have it both ways: on one hand he claims that nationalism becomes self-defeating if the dominant nation in a multi-national State does not alter its identity to accommodate its minorities, then on the other hand he claims that the majority has an incentive not to accommodate minorities but, rather, to impose its identity on them. If in fact the nation *is* the uniquely encompassing form of community that Miller suggests it is, then why should national minorities in general be any less secure in a multi-national State than in a State of their own? Conversely, if the dominant nation has an incentive to impose its identity upon minority groups then it seems that nationalism is *not* the uniquely encompassing form of community Miller claims it to be – in which case it must be something else that makes the nation superior to other forms of community as a basis for political society. See Miller (1995), pp.86-88.

[126] And, *a fortiori*, why nations are important in the first place.

[127] See Dahbour, pp.316-18.

greater detail in Chapter Four.[128] It will be remembered that according to liberalism in order to live the good life *individuals* must possess two fundamental freedoms: (a) the freedom to lead their lives 'from the inside' according to their own beliefs about what gives value to life; and (b) the freedom to question these beliefs and where necessary revise them. Kymlicka claims that an individual's interests, goals and characteristics are not independent of his/her social context, but are rather the result of socialisation processes. Thus, in deciding how we are to live our lives we do not start *de novo* but, rather, select from an available choice of options that are determined by our cultural heritage.[129] Moreover, alternative ways of life only have meaning to us because our culture identifies them as having significance.[130] "Put simply, freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us."[131] Kymlicka explains further:

> People make choices about the social practices around them, based on their beliefs about the value of these practices... And to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture.[132]

Therefore Kymlicka believes that while individual well-being is dependent upon the ability of individuals to make free choices about how to live their lives, this freedom is itself dependent upon cultural structures which both furnish the individual with examples of alternative ways of life and give meaning to them.[133] For this reason Kymlicka concludes that cultural membership is, in Rawlsian terms, a *primary good* and liberalism necessarily involves a concern with cultural structures because of their instrumental connection to individual choice.[134] The claim that individual well-being is

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[128] Note that Kymlicka is concerned, not with ethnic groups who want to secede and create their own State, but rather with those who wish for greater recognition of their ethnic identity by the modification of the laws and institutions of the larger society of which they are apart, in order to make them more accommodating to cultural differences. See Kymlicka (1995), p.11. The question is: are the same considerations which Kymlicka believes are capable of generating minority rights, also capable of justifying a right to secede?

[129] Kymlicka (1989), pp.14-19.

[130] Kymlicka (1989), pp.164-65.

[131] Kymlicka (1995), p.83.

[132] Kymlicka (1995), p.83.

[133] On this point also see Paul Gilbert, 'Communities Real and Imagined: Good and Bad Cases for National Secession' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.216

[134] Kymlicka (1989), pp.165-66.

defined in terms of certain ends which are themselves culturally determined is repeated by Margalit and Raz:[135]

> Individual well-being depends on the successful pursuit of worthwhile goals and relationships. Goals and relationships are culturally determined. Being social animals means not merely that the means for the satisfaction of people's goals are more readily available within society. More crucially it means that these goals themselves are...the creatures of society, the products of culture. Family relations, all other social relations between people, careers, leisure activities, the arts, sciences, and other obvious products of "high culture" are the fruits of society. [136]

Thus, membership of cultural, or 'encompassing' groups such as the nation[137] is important, even *vital*,[138] to individual well-being, as it greatly affects one's opportunities and one's ability to engage in the relationships and pursuits marked by the culture. Where a nation is decaying, or where it is persecuted or discriminated against "...the options and opportunities open to its members will shrink, become less attractive, and their pursuit less likely to be successful."[139]

To this Margalit and Raz add a second claim that membership of a national culture is important in one's self-identity, affecting how others perceive and respond to us, which in turn fashions our self-identity. Consequently, where a nation is not generally respected, or is the victim of persecution, then the dignity and self-respect of its members will suffer as a result.[140] Nielsen seems to agree when he claims that the nation "...pervade[s] the whole range of an individual's major life activities and

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[135] While there are important differences between Kymlicka and Margalit and Raz, all three theorists share the belief that liberalism's emphasis upon the moral primacy of the individual supports the conclusion that nations have special rights, including rights of self-government. On this point see Buchanan (1996), p.299.

[136] Margalit and Raz, p.448.

[137] Various theorists use different terms to refer to these cultural communities which, for reasons of brevity and to avoid any possible conclusion shall henceforth simply be referred to as nations. Note that this is not to say that the nation is the only example of such a cultural community. Indeed, one of the main concerns of this chapter is to demonstrate that because there may be various forms of community in addition to the nation capable of determining an individual's identity and goals, it is wrong to single out the nation for special treatment.

[138] Margalit and Raz, pp.449.

[139] Margalit and Raz, p.449. Also see Caney who agrees with Margalit and Raz's analysis (Caney (1997), p.362).

[140] Margalit and Raz, pp.447-49. Also see Tamir, p.73.

functions as an indispensable source of self-identification and self-definition."[141] Thus, for most people, there is a place where "...one feels most at home, a place that one longs for after a long absence, and there is, in that particular culture, for many people, a reasonably definite answer – more accurately an important part of an answer – to the question, 'Who am I?'" Once again, where a national culture and the various social structures and institutions which accompany it suffer harm or is absent altogether, people will have no secure sense of who they are and so will be unable to flourish.[142]

Moreover, it is also claimed that the primary good of cultural membership refers specifically to the culture in which one was born and raised, i.e. respecting peoples' own cultural membership and facilitating their transition to other, alternative cultures are not equally legitimate options. Because people are bound in an important way to their own cultural community we can't just transplant them from one culture into another, as moving between cultures is an option that is both rare and costly to individuals – particularly where the differences between cultures is vast.[143] Thus, cosmopolitans such as Waldron are simply mistaken when they assert that there is no need for individuals to have access to a complete culture or to maintain membership of their original culture.[144]

Finally, it is claimed that national cultures tend to have an invariably public character. Kymlicka, for example, claims that because national cultures do not involve just shared beliefs and values, but are embodied in institutions and practices such as schools, media, the economy and government, they therefore encompass both private and public spheres.[145] Moreover, it is this public dimension of national identity that enables the nation to provide its members with meaningful ways of life across the full range of human activities – social, educational, religious, recreational and economic.[146]

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[141] Nielsen (1998), p.110.

[142] See Nielsen (1998), pp.109-110; and Tamir, pp.71-73.

[143] Kymlicka (1995), p.86 and pp.175-77. Also see Nielsen (1998), p.109.

[144] For other theorists who, like Waldron, question whether the interest of cultural membership is necessarily specific to one's original culture of birth and upbringing see Buchanan (1996), p.299; and Michael Hartney, 'Some Confusions Concerning Collective Rights' in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), p.206.

[145] Kymlicka (1995), p.76.

[146] While Kymlicka's concern is here with what he terms 'societal cultures' he later claims that societal cultures tend to be national cultures. Kymlicka (1995), p.80.

Similarly, Tamir claims that in order to prosper a nation needs a public sphere, i.e. individuals must be given the opportunity to express their national identity both privately and publicly:[147]

> The existence of a shared public space is a necessary condition for ensuring the preservation of a nation as a vital and active community. The ability to enjoy the liveliness of public life is one of the major benefits that accrue from living among one's own people. Only then can the "individual feel that he lives in a community which enables him to express in public and develop without repression those aspects of his personality which are bound up with his sense of identity as a member of his community."[148]

The public nature of a national culture creates problems, however, when we consider that the State by its very nature cannot be culturally neutral. In deciding the language of public schooling, internal boundaries, State symbols, the dates of national holidays and so forth the government of a multi-national State unavoidably promotes certain cultural identities – invariably that of the majority – and thereby disadvantages others.[149] The viability of a national minority's culture may be further undermined by the economic and political decisions made by the majority, e.g. the minority may be outbid or outvoted on resources and policies that are crucial to the survival of their culture. Because these disadvantages cannot be redressed simply by granting all the State's citizens common rights such as the freedom to associate with others in the pursuit of common cultural practices, it is claimed that national minorities need special, group-specific rights to alleviate their vulnerability to majority decisions. While these rights may impose restrictions upon members of the larger society, this sacrifice is assumed to be far less than that which would be imposed upon members of national minorities if such rights did not exist.[150]

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[147] See Tamir, pp.8-9, pp.53-54, pp.73-74 and p.86. Also see Neil MacCormick, 'Is Nationalism Philosophically Credible?' in *Issues of Self-Determination*, ed. William Twining (Aberdeen: Aberdeen University Press, 1991).

[148] Tamir, pp.73-74. The quote is from Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p.207.

[149] i.e. a State's politics reflects the design of its culture.

[150] Kymlicka (1995), pp.107-11; Tamir, pp.145-50; L. W. Pye and S. Verba, *Political Culture and Political Development* (Princeton: Princeton University Press, 1966), pp.4-7; and C. Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), p.311.

C. Who Gets Rights: The Nation as Only One of Many Forms of Community

Many of the above claims will be considered in greater detail in Chapter Four. For the moment, however, suppose we accept the claim that membership in one's culture of birth and upbringing is a primary good in the sense described, *and* that the disadvantage cultural minorities face in ensuring their continued survival can only be remedied by granting them a measure of political self-determination. Two issues remain unresolved. First, political self-determination admits of many degrees with full Statehood at the very extreme end of the spectrum, and it is unclear why a lesser degree of political self-determination (e.g. powers of veto, territorial autonomy and guaranteed representation in central institutions) is not sufficient to guarantee the continued survival and flourishing of national minorities.[151] Second, the nation is but one example of a cultural community, so it also has to be shown why *nations* alone should be singled out as the exclusive holder of a right to secede.

Much of the philosophical literature on group-specific rights is restricted to two main issues: (a) whether or not we really need a theory of group specific rights; and (b) whether such rights are consistent with liberalism's individualistic moral ontology. Discussion of the first issue revolves around the question of whether the interests of groups are reducible to the interests of their individual members (the so-called *Reductionist Thesis*)[152] and whether or not there are certain types of valuable goods in which individuals have a strong interest, but to which only groups can coherently claim a right.[153] In contrast, discussion of the second issue is centred around the sorts of claims discussed above regarding liberalism's commitment to individual autonomy and

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[151] On this point see, for example, Wayne Norman, 'The Ethics of Secession as the Regulation of Secessionist Politics' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), p.36; Buchanan (1997), p.306; Philpott, p.362; and Allen Buchanan, 'The Right to Self-Determination: Analytical and Moral Foundations', *Arizona Journal of International and Comparative Law*, Vol.8, No.2, 1991, p.47.

[152] On the Reductionist Thesis see, for example: Michael McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism', *Canadian Journal of Law and Jurisprudence*, Vol.4, No.2, 1991; Margalit and Raz, pp.459-50; Leslie Green, 'Associative Obligations and the State' in *Law and the Community. The End of Individualism?*, ed. Allan C. Hutchinson and Leslie J. M. Green (Ontario: Carswell, 1989); and 'Two Views of Collective Rights', *Canadian Journal of Law and Jurisprudence*, Vol.4, No.2, 1991; Hartney, pp.206ff. On the relevancy of the Reductionist Thesis to group-differentiated rights see Kymlicka (1995), pp.45-47.

[153] On the issue of whether or not there are certain goods to which only *groups* can coherently claim a right see, for example: Denise Reaume, 'Individuals, Groups and Rights to Public Goods', *University of Toronto Law Journal*, Vol.38, 1988; Darlene M. Johnston, 'Native Rights as Collective Rights: A Question of Group Self-Preservation' in *The Rights of Monority Cultures*, ed. Will Kymlicka (Oxford:

freedom and whether these require us to grant rights to groups as well as individuals. While these are clearly important and relevant issues there is, however, another equally valid but perhaps somewhat under-stated, criticism of the nationalist theory. The objection is articulated most coherently by Buchanan[154] who questions why, even if an individual's interests *are* bound up with the flourishing of their cultural group and the best protection that can be afforded these interests is that the group be self-governing, nations should be singled out as the only example of a cultural group.[155]

Buchanan's objection is based upon a thesis of *Dynamic Pluralism* which claims that a society is comprised of numerous groups and individuals with various life-projects or conceptions of the good. For example, "[s]ome [may] think of themselves first as fathers or mothers or members of a family, and second as Swiss, or Americans, or Blacks, or Hispanics, or Christians. For others their primary self-identification is religious or political-ideological."[156] Moreover, not only may individuals change their allegiances but they may have multiple allegiances to different groups with no single predominant allegiance or identity. Thus, not all individuals will attach overriding priority to the same identity and for others no one identity may be more important or fundamental to their sense of who they are. This variation, claims Buchanan, will be particularly pronounced in liberal societies where, with their high levels of individual freedom of association and expression, individuals will continuously revise their conceptions of the good life and new groups will come and go.[157] The crucial point remains that:

> ...in pluralistic societies nationality will be only one source of identification and allegiance among others, and for some people it will be of little or no importance relative to other sources of identification and allegiance, whether these are cultural or occupational or religious or political or familial.[158]

Oxford University Press, 1995); Hartney, pp.203ff; Boykin, p.70; and Buchanan (1989).

[154] Similar points to those raised by Buchanan are, however, made by other theorists. See, for example, George, p.78; and Knight, p.439.

[155] Buchanan (1996), pp.301-2.

[156] Buchanan (1996), p.294.

[157] Buchanan (1996), pp.293-94.

[158] Buchanan (1996), p.294. A similar point is made by George who claims that because nations are not the only entities that are constitutive of individual identity, it is wrong to prioritise the nation as the sole candidate for independent Statehood as it falsely assumes that the identity of the nation is reducible to the

On the basis of this thesis of Dynamic Pluralism, Buchanan then lists a number of objections to singling out nations as the sole holders of a right of self-government: (a) it is based upon a false ontology which has nations as the only or the predominant source of individual self-identification and allegiance; (b) it ignores the fact that for many people nationality is not so important and that whatever importance nationality now possesses may decrease over time;[159] (c) it violates the principle of equal respect for persons by devaluing alternative forms of identification and allegiance by showing less respect for those individuals whose identities and allegiances they are;[160] and (d) granting the nation rights of self-government facilitates the domination of nationality over these other sources of allegiance and identification.[161]

The important issue here, however, is not whether nationalist theories of secession violate liberalism's principle of equal respect for persons by prioritising the nation over and above other, additional forms of identity and allegiance – although this is not to say that Buchanan may not have a valid point here. Rather, the central issue is that if nations are to be singled out as the exclusive bearers of a right to secede then it must be shown why nations *alone*, amongst all the various forms of community, warrant such special treatment. To grant a right of secession to nations, while denying the same right to other groups, is morally arbitrary unless the nation can somehow be differentiated from these other groups as possessing a property which makes it uniquely suitable as the sole holder of a right of secession.

Moreover, the claim that membership of a cultural community such as the nation is a prerequisite to individual well-being and autonomy, even if true, cannot perform this function because the nation is only one example of such a community. While

personal interests of its members, such that respect for persons requires respect for the nation before any other community. Additionally, these various factors of personal identity may conflict, e.g. if I identify as a Buddhist rather than a Thai, then respect for me as a person requires respecting my religion rather than my nation. So respect for persons does not *necessarily* require respect for the nation of which they are a member (George, pp.76-78).

[159] i.e. even if nationality *is* the predominant source of self-identification and allegiance in a given society, there is no guarantee that it will retain this pre-eminent status. Buchanan (1996), p.296.

[160] Buchanan (1996), p.294.

[161] Buchanan (1996), p.295. Thus, argues Buchanan, granting nations exclusive rights of political self-government not only violates the liberal principle of equal respect for persons, but also hampers individuals' efforts to change their conceptions of the good by disadvantaging other, alternative sources of identification and allegiance that might become important for individuals were nations not given such privileged status (Buchanan (1996), p.297).

individuals may look to their membership of a nation for their sense of self-identity and to provide them with various options from which to choose and to give meaning to these options, they may also look to other, alternative forms of community or a combination of different forms of community to perform these same functions. In summary: because one's sense of self-identification and self-definition may be determined by one's membership of other communities aside from, or in addition to, the nation, membership of a nation, and the continuing vitality of that nation, are not necessary conditions for individual flourishing. Therefore if we are going to grant nations rights to self-government because of their instrumental connection to individual well-being and autonomy we must, if we are to avoid a charge of moral arbitrariness, also grant it to other forms of community which perform the same functions as the nation.

D. Nielsen's Objection: The Nation as an 'Encompassing' Form of Community

In response to the above objection Nielsen claims that nationality *is* distinct from other forms of identity because it encompasses and integrates them. This is not to say that national identity is morally primary or superior to other allegiances and identities, simply that these other identities *require* the encompassing culture that goes with nationality.[162] Thus, while one's interests and roles may be much more important to one than one's nationality, for each of these things nationality provides the context of choice and the integrating structure and so is prior to them.[163]

> Being a good musician, being a gentle lover, being politically committed, being a kind and caring person, being a good Catholic, being a dedicated teacher, being an active member of one's local community, being a talented dry-fly fisherman, and a myriad of other things may be more important to one, sometimes vastly more important to one, than one's nationality, but for most of these things at least, one's nationality provides the context of choice for these things and the integrating structure for them.[164]

Thus, claims Nielsen, the claim is *not* that nationality provides the primary source of self-identification for people or that nations are morally primary. Rather, the position

[162] Nielsen (1998), pp.126-27.
[163] Nielsen (1998), pp.124-25.

of privilege afforded to nations is 'strategically instrumental' – i.e. a reflection of the fact that *only* the nation provides a meaningful context of choice without which individual autonomy is impossible.[165] Nielsen concludes that:

> What is so special about nations, among the various groups, that entitles them to political self-government and to a presumption, everything else being equal, to statehood, is that they, in contrast to the other groups, are encompassing (integrating) cultures, located historically on a territory which the people making up the nation regard as their homeland or, if they are in diaspora, aspire to make their homeland and furthermore, and distinctly, that they are of sufficient size and sufficient infrastructure to be able to carry out the functions of a state... Such groups are (a) capable of self-government and (b) should, everything else being equal, be self-governing because that alone provides a thoroughly secure meaningful cultural context of choice which, in turn, is necessary for autonomy and human flourishing. No other group meets both conditions (a) and (b).[166]

However, Nielsen's argument here appears to be somewhat misguided. As was noted above, the aspiration for self-government is extremely problematic as a criterion of nationhood.[167] Moreover, Nielsen's first condition that a group be capable of self-government (i.e. 'that they are of sufficient size and sufficient infrastructure to be able to carry out the functions of a State') does *not* apply exclusively to nations. The same could also be said of, say, many ethnic, linguistic, religious, lifestyle, interest and economic groups. Furthermore, as Nielsen himself later admits, many of the groups which we think of as nations are frequently too small, poor and/or geographically dispersed to be able to form viable, independent States.[168] Therefore the criterion of political viability cannot distinguish the nation from other forms of community.

Nielsen's second condition that self-government alone can provide a 'thoroughly meaningful cultural context for individual choice' returns us to the question of why a lesser degree of self-government than full Statehood is not sufficient to guarantee a nation's well-being. Nielsen claims that national minorities are only secure when they

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[164] Nielsen (1998), pp.124-25.

[165] Nielsen (1998), p.126.

[166] Nielsen (1998), p.127.

[167] See, for example, Beran (1993), p.483.

[168] See Nielsen (1998), p.127. On this same point also see Freeman (1998), p.22; Linda Bishai, 'Altered States: Secession and the Problems of Liberal Theory' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.104-5; and Kymlicka (1995), p.186.

gain the degree of control over the conditions of their existence offered by independent Statehood, i.e. anything less than full political independence entails a fragile and insecure existence.[169] In addition to extreme examples such as the former Soviet Union and Yugoslavia which demonstrate the precarious existence of national minorities in multi-national States, those multi-national States that *are* secure constitutional democracies such as Switzerland, only work well because they devolve almost all power and control to their various sub-national groups.[170]

But if, as in the case of Switzerland, the survival of a nation's culture *can* be ensured by a lesser degree of political independence than full Statehood, what reason is there to automatically assume that the cultural survival of nations requires that they be afforded their own State? Nielsen's response seems to be that the degree of political independence enjoyed by national minorities in countries such as Switzerland is so great that they are practically independent States anyway, so why not 'go the whole hog' and just give them their own State. However, given that the degree of political independence enjoyed by national minorities in countries such as Switzerland already approximates that of full independence, then not only may any benefits produced by granting these a marginal increase of political self-government be negligible, but they may be outweighed by the economic costs sustained in setting up and maintaining a nation-State.

Moreover, it is questionable just how much physical and cultural security independent Statehood really *can* offer a national minority.[171] Where a territorially concentrated national minority is suffering serious and sustained discrimination at the hands of a hostile majority, simply drawing a political boundary around the minority and declaring it an independent State will not make it invulnerable to the hostile actions of the parent State, and may simply elevate the conflict to an international level. As the German invasion of Poland in 1939 and the Iraqi invasion of Kuwait in 1991 demonstrate, the

[169] See Nielsen (1993), p.32 and (1998), p.110. This same point is repeated by Margalit and Raz who claim that national minorities that do not enjoy self-government are frequently the victims of persecution, discrimination and neglect and that multi-national States have historically proven to be ineffective in protecting and enhancing the social identities of their constituent national groups. See Margalit and Raz, p.457.

[170] Nielsen (1993), pp.32-33.

[171] On this point see, for example, Lee Buchheit, 'The Logic of Secession', *Nations and Nationalism*,

vulnerability of small States to their larger, more powerful neighbours may be just as great as that of a national minority within a multi-national State.

What then, about *cultural* security? In defence of the claim that independent Statehood furthers the cultural security of nations it is claimed, firstly, that "[m]embers of a nation are more concerned than outsiders to further their own culture. Consequently, politicians in a nation-state will have a greater incentive to promote that nation's culture than would politicians in a multinational state in which that nation is a minority."[172] Secondly, as was noted above, the public institutions and practices of a multi-national State will generally reflect the culture of the dominant majority, thus restricting the opportunity for members of the national minority to promote and express their culture. While such discrimination may be alleviated to some degree by granting national minorities Kymlicka-style group-specific rights against the majority, giving a national minority its own, nation-State would provide an *even greater* degree of cultural expression and promotion for national minorities by ensuring that their culture was embodied in public institutions and practices. Members of a national minority may be able to achieve *some* degree of cultural expression in a multi-national State, but this does not show that they could not acquire even greater cultural expression were they to live in their own nation-state.

However, while giving a nation its own State may increase the opportunities for members of that nation to express and promote their own national culture, it does not follow that their national culture will therefore be preserved. In order to take its place in the international community the citizens of a nation-State must interact with members of other national cultures and this interaction is likely to produce cultural change.[173] For instance, if a nation-State is to trade with other States and reap the economic benefits that such trade provides, then it must adopt certain standardised business practices, open its markets to foreign goods, reorientate its economy to that of the global marketplace, enable access to the latest information through the global media

Vol.2, No.3, 1996, p.811.

[172] Caney (1997), p.362.

[173] See Michael Walzer, 'The New Tribalism', *Dissent*, Vol.39, 1992, p.168; and Buchanan 'Secession', pp.62-63.

network, allow its citizens to travel abroad while also enabling those of other nations to enter its own borders and so forth.

This is not to say that the nation-State may not retain *some* elements of its traditional culture, e.g. the Japanese are still Japanese just as the Russians are still Russian and the French still French. Despite the fact that all three States are members of the international political and economic community there are still pronounced cultural differences between them. Yet it is equally true that many of the cultural influences in these countries are increasingly *global* in nature and that their political boundaries have offered little, if any, protection against these influences. The only way of escaping these cultural influences is complete isolation,[174] which is not only increasingly impractical for both economic and technological reasons, but comes with a hefty price tag attached to it. Does anyone *really* recommend following the example of North Korea for the sake of cultural preservation?

Finally, even if, as Nielsen suggests in his second condition, self-government alone can provide a secure cultural context of choice, this does not establish that the nation is the *only* example of a cultural context of choice, so why should the nation be singled out for special protection?[175] Nielsen's response to this objection is to say that national identity performs an integrating function by encompassing other forms of identity. Yet, as Buchanan in anticipation of exactly this objection has noted, nations are *not* the only encompassing groups; i.e. the same integrating and encompassing functions Nielsen ascribes to the nation may be performed by, say, religious communities. Thus, for some people "...their religion may serve as both their primary source of self-identification and a way to integrate and render coherent their other identifications..."[176] In fact, many people find it easier to move from one nation to another than to change religions. Nielsen, however, appears to reject the assertion that other forms of identity, particularly that of religion, may perform the same encompassing and integrating functions as nationality.

[174] See Dowding, pp.84-87.
[175] Buchanan (1996), p.302.
[176] Buchanan (1996), p.297.

> It is not that this sense of nationality...necessarily, or even typically, provides the primary source of self-identification for everyone. For some their religion will do that, integrating and rendering coherent their identifications and the like. But...religion, in the forms that it takes, in its very possibility of arising and being sustainable, requires even more encompassing cultural structures, structures that go with nationality, e.g. ...we worship in a particular way, in a particular language, and with a whole battery of other practices.[177]

Nielsen's analysis here is, at best, rather ambiguous. On the one hand he seems to admit that other forms of community in addition to nationalism (in this case religion) *can* perform encompassing and integrating functions, i.e. nationalism is *not* the only encompassing form of identity. On the other hand, however, Nielsen also seems to think that these additional forms of community presuppose the cultural structures that accompany nationality – particularly language – with the result that they are themselves encompassed by nationality, i.e. nationalism is a *supra*-encompassing form of self-identification and self-definition.

This, however, seems false. To begin with, language may well be important to the establishment and continued vitality of religious practices and institutions, but then the same is true of national institutions as well. Just as religious worship is conducted in a particular language so too is national rhetoric. Indeed, as Nielsen later admits, language *cannot* equal nation for if it did France and Quebec, for example, would be the same nation (see above). And while Nielsen may be correct when he says that language is very closely related with an encompassing culture (*pace* Wittgenstein),[178] this does *not* mean that the only encompassing culture is the nation. Furthermore, while the practices and institutions that together constitute a religious community, and which are a source of self-identification and self-definition for adherents to that religion, may have their roots in other cultural structures the same may also be true of the nation. Indeed, religion is itself an important component of many national identities, e.g. Islam is a major component of the national identity of Iran and Saudi Arabia while Judaism is central to Israeli national identity. So why, if religion is both anterior to, and a constitutive component of, numerous national identities, should we necessarily assume that national identity encompasses religious identity rather than *vice-versa*?

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[177] Nielsen (1998), p.126.

[178] See Nielsen (1998), p.124.

2.6 CONCLUSION

The Nationalist theory of secession claims both that there is a right to secede (i.e. secession may be a morally justified form of action) and that nations are the exclusive holders of such a right. Thus, the theory must satisfactorily address two questions: 'What are nations?' and 'Why should nations, and *only* nations, be granted a right of secession?' To successfully demonstrate how nations may be distinguished from other, similar social entities and one another is not also to demonstrate that nations are the exclusive holders of rights – never mind a right of secession. Similarly, to demonstrate that there may exist a right of secession without somehow particularising that right exclusively to nations will not, on its own, successfully demonstrate that nations, and only nations, may possess and exercise that right.

With respect to the former question of identifying the nation it was pointed out that there are two primary approaches to this issue in the extant literature on the subject. The first defines nations according to certain objective criteria, the four most common of which are a common language, culture, ethnicity and history. However, because linguistic, cultural, ethnic and historical distinctiveness are all matters of degree, all four criteria suffer from the conceptual difficulty of identifying a threshold of distinctiveness without being completely arbitrary in where they draw the line between, for example, two dialects of the same language and two different languages. There is also the difficulty that, even if this threshold problem may be overcome, the groups identified as nations under such criteria are unlikely to match those which we think of as nations or which typically claim a right of secession.

Not surprisingly, then, most theories of nationalism instead incorporate a subjective definition of nationhood. However, while a subjective account may have certain advantages over a purely objective analysis it too suffers from the same threshold problem as the objective account outlined above. Moreover, because under a subjective account individuals may belong to more than one nation, if nationhood is a prerequisite for possession of rights – including the right to secede – there is a danger that the theory may bestow conflicting rights. In other words, serious difficulties remain with a

subjective definition of nationalism – difficulties which must first be ironed out if the Nationalist theory of secession is to be taken seriously.

Putting the question of what a nation is to one side, there is the additional difficulty of demonstrating why nations should be the exclusive bearers of rights, particularly a right to secede. Miller's claim that there is a necessary connection between national homogeneity on the one hand, and democratic government on the other, is unconvincing because he fails to establish that the nation is the only or the best form of community required for democratic government. Similarly, with respect to Miller's claim that national homogeneity enables a State to overcome coordination problems endemic in the provision of certain collective goods, Miller's defence of the nation as a uniquely accommodating form of identity is insufficient to establish that the nation is the only or the best source of the type of community required by such schemes.

Finally, the claim that individual well-being is dependent upon the flourishing of certain cultural groups was found to be insufficient to demonstrate that nations are the exclusive holders of a right of secession. Not only may a lesser degree of political self-determination than independent Statehood be sufficient to guarantee the flourishing of such groups, but there is no reason to suppose that the nation is the only or the best example of such a cultural group. Moreover Nielsen's characterisation of the nation as a uniquely encompassing cultural group is insufficient to overcome a charge of moral arbitrariness in singling out nations as the sole bearers of a right of secession because other, additional forms of community may perform the same encompassing functions as the nation. Therefore, even if continued membership in, and the flourishing of, one's culture of birth and upbringing *is* a prerequisite to individual freedom and well-being (which is itself a contestable claim), there is no reason to believe that the nation is the *only*, or the *best*, example of such a culture. Until nationalist theorists such as Miller and Nielsen can satisfactorily address these concerns – presuming that they in fact *can* – it is entirely arbitrary to single out the nation as the sole bearer of a right to secede and we would do well to look at other, alternative theories of secession to see if they fare any better.

3

JUST CAUSE THEORIES OF SECESSION

3.1 INTRODUCTION

A. What is a Just Cause Theory of Secession?

The purpose of this chapter is twofold: (a) as in the case of Nationalist theories, to argue against a second, alternative type of secession theory known as 'Just Cause' (JC) theories; and (b) to clarify certain issues raised by JC theories regarding territory and the notion of *territorial sovereignty* and examine their relevance to justifying a right of secession in general. Before we can critically assess JC theories, however, it is first necessary to set out exactly *what* a JC theory is. The chapter therefore begins by defining JC theories of secession and looking at how JC theories differ from the other two types of secession theory. Following this the theory of Allen Buchanan – perhaps the most well known JC theorist – will be introduced, and the aims and structure of the chapter further clarified.

Put simply, JC theorists argue that a State exercises legitimate authority over a territory and its citizens[1] as long as it treats the inhabitants of that territory justly.[2] In other words, in order to possess a right to secede a group must first demonstrate that it is the victim of an injustice *for which secession is an appropriate remedy* (of last

[1] The notion of legitimate territorial sovereignty and the relationship between a State's authority over its subjects and its territory (if any) will be addressed shortly.

[2] Wayne Norman, 'The Ethics of Secession as the Regulation of Secessionist Politics' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), pp.41-42.

resort).[3] Thus, whereas, *ceteris paribus*, Nationalist theories of secession grant a right of secession to groups which qualify as nations, and Liberal-Democratic (LD) theories to groups which contain a majority of members who have expressed a desire to secede, JC theories require a group to first be a victim of a particular (type of) injustice if they are to possess a right of secession.

The most notable proponent of JC theories is Allen Buchanan who, with the possible exception of Beran, has also been the most prolific contemporary writer on the issue of a right to secede. Indeed, in many respects it was Buchanan who, in his 1991 book entitled *Secession*,[4] initiated the current scholarly debate on a normative right to secede. The importance of his numerous contributions to the normative literature on secession is underscored by the fact that, in many respects, it has been Buchanan who has set the debate's agenda. Whereas in Section 2.5 of the previous chapter Buchanan and his thesis of Dynamic Pluralism were defended from objection, in this chapter it will be argued that Buchanan's defence of JC theories – though imaginative and thought-provoking – leaves something to be desired and fails to demonstrate that JC theories are superior to the other two rival types of theory.

B. Buchanan's Theory of Secession

Because Buchanan's is by far the dominant JC theory, and no treatment of a moral right to secede would be complete without a discussion of his work, the ensuing discussion will focus upon Buchanan's theory. The JC theory claims that a State exercises legitimate authority over its territory *and* its citizens providing it meets certain minimal standards of justice in the treatment of its citizens. This distinction between the State's authority over its subjects and its territory is an important one for Buchanan, who bases the right to secede upon the notion of *legitimate territorial sovereignty*. Buchanan claims that because secession is only intelligible in terms of the appropriation of land and the wealth contained upon/within that land, "[t]he moral relevance of this loss will depend upon who has *legitimate title* to the wealth in

[3] See, for example, Margaret Moore, 'Introduction: Self-Determination Principle and the Ethics of Secession' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), p.5.

[4] Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and*

question."[5] Thus, simply demonstrating that the State does not possess legitimate authority over a group of individuals is not sufficient to justify the secession of that group. To show that a group of individuals no longer have an obligation to obey the State does not also demonstrate that they therefore have a right to take a portion of that State's territory.[6]

Moreover, claims Buchanan, in order for secession to be justified the seceding group must demonstrate, not only that the State *does not* possess legitimate sovereignty over the territory in question, but also that they *do*.[7] I term this consideration the *territoriality constraint*. The first condition of the territoriality constraint may be fulfilled in two ways: either (a) the State *never* exercised legitimate sovereignty over the territory; or (b) while the State at one time exercised legitimate sovereignty over the territory it has now *lost* it. Note, also, that Buchanan conceives of legitimate territorial sovereignty as being both a *binary feature* (i.e. a party either possesses legitimate sovereignty over a particular geographical region or it does not) and an *exclusive feature* (i.e. only *one* party can possess it at any one time, e.g. to say that the State is the legitimate owner of a territory is also to say that a secessionist group, and everyone else, is *not*).

This, however, does not mean that legitimate territorial sovereignty, or legitimate title,[8] denotes *ownership* by the State of its territory. Indeed, Buchanan rejects the notion that the State possesses a *property right* in its territory, claiming instead that

Quebec (Oxford: Westview Press, 1991).

[5] Buchanan, p.12 [emphasis added].

[6] Buchanan writes: "Clearly, the fact that the government has lost its legitimacy due to perpetration of injustices does not *in itself* imply that the secessionists have a valid claim to the land and other goods in the seceding area." Buchanan, p.12. This in turn raises the question of the relationship between territory (and State sovereignty over territory) to private ownership of land. The more immediate concern, however, is the role of legitimate territorial sovereignty in the justification of a right to secede and it is this issue that the following discussion of territory in Section 3.2 will focus upon. While clearly a relevant concern, the wider issue of private land ownership is one that must be left for elsewhere.

[7] Refer Buchanan, p.113. Of course, given the exclusive nature of legitimate territorial sovereignty, to demonstrate the latter condition is to also demonstrate the former - i.e. if the secessionists can show that they *do* possess legitimate sovereignty over a given territory then, *a fortiori*, this is to also show that the State (and everyone else) does *not*. Note, however, that the reverse is not true – to merely demonstrate that the State does *not* possess legitimate sovereignty over a territory is not to also demonstrate that the secessionists *do* possess legitimate sovereignty over that territory. This point is of considerable significance for Buchanan's analysis.

[8] Buchanan uses the two terms inter-changeably.

"...the relationship between the state and its territory is not the same as that between a person and the land which is her private property."[9] Rather, Buchanan conceives of the State as an *agent* acting on behalf of the people, which is authorised by the people to perform certain protective functions on their behalf. Hence, instead of signifying a private property right ascribed to the State, territorial sovereignty instead signifies a complex relationship among the State (i.e. the *agent)*, the people (i.e. the *principal*) and the territory, with the State acting on the principal's behalf to preserve the territory. For Buchanan, territorial sovereignty is "...simply the authority to control borders...and to administer within those borders laws designed to protect property rights and other rights of citizens, including future citizens who will come to exist."[10]

The issue now is to determine the conditions under which a secessionist group can fulfil the territoriality constraint. Buchanan investigates what he terms the *reasons*, or *arguments*, which a group may have for seceding in order to determine which, if any, "...are of such moral weight as to ground a right to secede"[11] and identifies three such arguments: (a) *discriminatory redistribution*; (b) the need for *self-preservation*; and (c) *rectificatory justice*. These three arguments, and some common objections to them, may be summarised as follows.

The *Argument from Discriminatory Redistribution* (ADR) is based upon a situation where the parent State is the perpetrator of certain forms of injustice against a particular group (which may or may not involve considerations of discriminatory redistribution)[12] and through failing to carry out its function as a trustee of the people, loses its territorial sovereignty (at least with respect to the area in which the victims of the injustice reside). Buchanan attaches a number of conditions which a group must fulfil in order to possess a right to secede under such circumstances: (a) secession must be the *only*

[9] Buchanan, p.108. Indeed, equating legitimate territorial sovereignty with legitimate ownership would succeed only in changing the question to 'What is *ownership* and under what conditions is ownership of territory il/legitimate?' Furthermore, because most conceptions of ownership are based upon the notion of individual ownership, any such theory would be likely to contain numerous conceptual difficulties relating to how an institution (such as the State) or a group of people (such the Kashmiris), rather than an identifiable individual could be said to collectively possess a property right.

[10] Buchanan, p.109.

[11] Buchanan, p.29.

[12] See Buchanan, p. 112.

way of remedying the condition of injustice; (b) the injustice must be serious; and (c) the injustice must be selective towards the people of the seceding region.[13]

Objections to the ADR are generally premised upon considerations of social and economic justice and the concern that the partitioning of territory may result in gross economic inequalities. Dowding, for example, argues that the ADR would justify the exit of wealthy regions or groups from a State thus leaving the poorer inhabitants of that State worse off. In other words, secession flows from naked self-interest not social justice.[14] Additionally, it is also pointed out that there is a difficulty in determining exactly what counts as exploitation. Most States contain a group of people poorer than the rest of the State's inhabitants, yet generally these people do not see themselves as victims of (institutionalised) economic injustice.[15] Moreover, the remedy for such situations may be better economic management, not secession.[16]

Buchanan's second argument – the *Argument from the Need for Self-Preservation* (ANSP) – concerns a situation where a group faces a *lethal threat* by an aggressor, such that the group's continued survival is in serious danger and secession is the *only* way to eliminate this threat. Buchanan identifies two variants of this principle. The former variant concerns a situation where the aggressor is the State from which the group wishes to secede, whereas the latter variant is based upon a scenario where the aggressor is a third party.[17] Buchanan then claims that in the former case the State's territorial sovereignty is *invalidated* or *outweighed* by the need of the group to preserve their existence, whereas in the latter case the group's need to preserve themselves *generates* a valid claim of territorial sovereignty where none previously existed.[18]

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[13] Buchanan, p.112.

[14] Keith Dowding, 'Secession and Isolation' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.78-79.

[15] Daniel Philpott, 'In Defense of Self-Determination', *Ethics*, Vol.105, 1995, p.377.

[16] Cass R. Sunstein, 'Approaching Democracy: A New Legal Order for Eastern Europe. Constitutionalism and Secession' in *Political Restructuring in Europe. Ethical Perspectives*, ed. Chris Brown (London: Routledge, 1994), pp.31-33.

[17] Buchanan draws an analogy with the common law defence of necessity, where property rights may be infringed if doing so is necessary to avert some great evil – e.g. "...I may trespass on your land to prevent a serious crime." See Buchanan, pp.65-66.

[18] Buchanan offers the example of Jews in Poland who, facing a lethal threat from the invading Nazis, decided to set up a Jewish sanctuary State on what was previously territory under the sovereignty of the Polish State. Buchanan claims that in this case the need of the Jews to defend themselves, coupled with

Objections to Buchanan's ANSP include the claims that secession is not an option available to geographically dispersed groups[19] and where one group is hell-bent upon destroying another, granting the victimised group independent Statehood may simply succeed in elevating the conflict to an international level.[20] Another objection is based upon the claim that while many groups share a history of suffering, it would be unreasonable to claim that they are therefore entitled to their own State, e.g. homosexuals and certain religious sects have at times been the victims of brutal persecution but we would not, for this reason, be inclined to create a Quaker or lesbian State.[21] The solution in such cases, it is argued, is to remove the threat – not to grant the victim a separate State.[22] Finally, it is also claimed that if a group cannot escape the injustices perpetrated against it by its parent State, then this simply generates a limited term dominion until the threat of injustice is removed rather than full, indefinite territorial sovereignty.[23]

Finally, in the *Argument from Rectificatory Justice* (ARJ), Buchanan considers the case of so-called 'captive communities' such as the Baltic States which were forcibly annexed by Nazi Germany and then the former Soviet Union. Here Buchanan claims that "...a [geographical] region has the right to secede if it was *unjustly incorporated* into the larger unit from which its members wish to separate."[24] 'Unjust incorporation' is defined by Buchanan in terms of the annexation of the seceding region by either the existing State or by some earlier State that is the 'ancestor' of the currently existing State.[25] In both cases the State acquires the territory through forcible seizure against

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the fact that the Polish State was unable to meet its obligations to defend its citizenry, voided Poland's territorial sovereignty over the seceding region. See Buchanan, pp.66-67.

[19] Once again, however, note the real world examples provided by Barry Smith of geographically non-contiguous States which have a part of their territory surrounded by the territory of another State. See Barry Smith, 'The Cognitive Geometry of War' in *Current Issues in Political Philosophy*, ed. Peter Koller and Klaus Puhl (Vienna: Hölder-Pichler-Tempsky, 1997).

[20] Linda Bishai, 'Altered States: Secession and the Problems of Liberal Theory' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.97. Also refer to the previous chapter where it was pointed out that simply granting a group independent Statehood may, on its own, be an ineffective means of ensuring the physical and cultural security of that group.

[21] Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993), pp.82-83.

[22] Sunstein, p.27.

[23] Maurice Rickard, 'Buchanan, Allen, Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec', *Australasian Journal of Philosophy*, Vol.71, No.4, 1993, p.503.

[24] Buchanan, p.67 [emphasis added].

[25] Similarly Brilmayer claims that a region is unjustly incorporated into a State either (a) through conquest by the State from which the group wishes to secede, or (b) through having been unjustly joined

the will of its inhabitants and secession is viewed simply as the re-appropriation of stolen property by the legitimate owner.[26] If the territory was unjustly taken from the secessionists, then this demonstrates that the State lacks legitimate title and that they (i.e. the secessionists) *do* have legitimate title.[27] In other cases, claims Buchanan, where the group seeking to secede are not the same people who possessed legitimate sovereignty over the territory at the time of its unjust seizure, the secessionists must establish a link between the original group and themselves in order to demonstrate that legitimate territorial sovereignty has been transferred to them.[28]

Objections to the ARJ include a claim of *reductio ad absurdum* based upon the problem of how far back in time we should go with respect to instances of unjust territorial acquisition. Because world history is resplendent with instances of the unjust taking of territory, general adoption of the ARJ would appear to result in the almost limitless dismemberment of States and, consequently, enormous disruption and turmoil.[29] Buchanan's solution to this problem is to suggest a *moral statute of limitations*.[30] The problem with such an approach, however, is to determine exactly *where* to set the temporal threshold without being completely arbitrary.[31] For example, how can we justifiably say that a group whose land was wrongfully taken from them in, say, 1820 would be justified in seceding, but a similar group whose land was also wrongfully taken from them under similar circumstances in 1819 would not? Buchanan, while recognising this as a problem, is largely silent on how it might be resolved.[32]

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with that State by a third State with no stake in the current dispute. As an example of the second case Brilmayer cites "...the European colonial powers, who fixed colonial borders to suit their own convenience, and then left these borders intact when their empires receded." See Lea Brilmayer, 'Secession and Self Determination: A Territorial Re-Interpretation', *Yale Journal of International Law*, Vol.16, No.1, January 1991, p.190.

[26] Note, however, that Buchanan's analogy with stolen property is problematic in view of his rejection of the assertion that the State possesses a property right in its territory. See Bishai, pp.97-98.

[27] Buchanan, p.110.

[28] Buchanan, p.68.

[29] See, for example, Sunstein, p.34.

[30] i.e. a temporal boundary which places a limit as to how far back in time secessionists may go in order to justify their demands. See Buchanan, p.88.

[31] It will be remembered from the previous chapter that it was exactly this problem which led Buchanan to reject objective criteria of nationhood. Refer Buchanan, p.49.

[32] Although he does suggest that the boundary must be greater than one human lifetime from the present, as if it were not then it would ignore the fact that persons now living had been wronged and that redress

This temporal problem points to another, related difficulty: namely that the intuition behind the ARJ (i.e. the return of stolen property) may be lost or diminished over time. Latvia, for example, was forcibly incorporated into the former Soviet Union after the Second World War along with the other Baltic States of Lithuania and Estonia. We might, on the basis of this fact, therefore conclude that Latvia has a right to secede from the former Soviet Union (as in fact it already has done). But what if, since its forcible incorporation, the number of Russians living in Latvia came to outnumber the number of Latvians living in Latvia?[33] These Russians have rights too and it is unlikely that they would support the idea of an independent Latvian State. The same problem is also evident in the case of Han Chinese who have migrated to Tibet, and in the case of many indigenous peoples who had their land unjustly taken from them by colonial settlers and who are now a small minority in their original land.

C. The Structure of this Chapter

Clearly Buchanan's emphasis upon the importance of territory and legitimate sovereignty over it raises some important issues regarding the question of a right to secede. Thus, the first task of this chapter will be to investigate just how important territory and the notion of legitimate territorial sovereignty are to understanding what secession is, and to the normative evaluation of secessionist claims. Having addressed the issue of territory, the second task of the chapter will be to investigate Buchanan's claim that JC theories of secession – or, more accurately, *his version* of a JC theory – are necessarily superior to LD and Nationalist theories of secession. Buchanan believes that JC theories are superior to these other types of theory because they score better with respect to three criteria which he claims should be used to determine a theory's degree of satisfactoriness. These three criteria will be examined in detail as will Buchanan's claim that they support his conclusion that JC theories are superior to other, rival theories of secession.

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could still be made to them (Buchanan, p.89). Also see Allen Buchanan, 'Self-Determination, Secession, and the Rule of Law' in *The Morality of Nationalism*, ed. Robert McKim and Jeff McMahan (New York: Oxford University Press, 1997), p.311.

[33] See Michael Walzer, 'The New Tribalism', *Dissent*, Vol.39, 1992, p.167. Also see Bishai, pp.97-98; and Jeremy Waldron, 'Superseding Historical Injustice', *Ethics*, Vol.103, No.1, 1992.

Of course, even if Buchanan is right – and JC theories *are* superior to Nationalist and LD theories of secession – the question remains why, given that there may be all sorts of different types of JC theory that take different injustices as grounds for a right to secede, Buchanan's is necessarily the superior alternative. In other words, what is it about the three types of injustices listed above that makes Buchanan's theory superior to other, alternative JC theories premised upon different injustices? Hence, the third and final task of the chapter will be to address the superiority of Buchanan's version of a JC theory with respect to other, competing JC theories and, indeed, whether or not JC theories really *are* a distinct type of secession theory.

3.2 THE ISSUE OF TERRITORY

A. Introduction

Much of what Buchanan has to say about territory, legitimate sovereignty over it and the importance of these to justifying a right to secede, is premised upon the analysis of the legal scholar Lea Brilmayer.[34] Brilmayer rejects what she terms the 'standard account' of secession which portrays secessionist disputes as a clash between the two opposing principles of: (a) the self-determination of peoples; and (b) the right of existing States to maintain their territorial integrity. Because the standard account sees the difference between proponents and opponents of secession simply in terms of the relative priority which they accord these apparently competing values within specific contexts,[35] Brilmayer claims it ignores the territorial dimension of secession, and consequently provides an inadequate descriptive *and* normative account of secessionist disputes.[36]

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[34] In this chapter I will be mostly concerned with Brilmayer's 1991 article in the *Yale Journal of International Law*. Elsewhere Brilmayer has focused upon Liberal-Democratic theories of secession and the *particularisation problems* which she believes these theories face in relation to the issue of territory and the territorial delineation of political sovereignty. See Lea Brilmayer *Justifying International Acts* (New York: Cornell University Press, 1989) and 'Consent, Contract and Territory', *Minnesota Law Review*, Vol.74, No.1, 1989. These issues will be addressed later in the thesis.

[35] Brilmayer (1991), pp.177-83. The same point is also made by McGarry and Moore who claim that secession is mostly about contested territorial claims – emphasis upon the nationality of group membership fails to acknowledge the territorial dimension of many national conflicts. John McGarry and Margaret Moore, 'The Problems with Partition', *Politics and the Life Sciences*, Vol.16, No.2, 1997, p.267.

[36] See Brilmayer (1991), p.179 and pp.194-95.

Brilmayer believes that the territorial dimension of secession is important for two reasons. First, it distinguishes secession from other, associated concepts in political theory such as revolution and emigration. Whereas refugees seek to leave the State geographically, secessionists seek to leave the State without physically leaving for another location.[37] Similarly, whereas the revolutionary seeks to overthrow or make fundamental constitutional, economic or socio-political changes *within* the existing State, the secessionist simply seeks to restrict the State's jurisdiction so that it does not include his/her own group *and the territory that they occupy*.[38] Second, "...without a normatively sound claim to territory, [political] self-determination arguments do not form a plausible basis for secession."[39] Thus, claims Brilmayer, because secession is only intelligible in terms of the taking of territory, any given act of secession can neither be understood, *nor normatively evaluated*, without reference to legitimate territorial sovereignty. To be persuasive a claim of secession *must* contain a valid territorial claim.[40]

Brilmayer also points out that if a sub-group within a State is suffering at the hands of the dominant majority of that State, secession is not the only remedy available to that group – the group may either emigrate to a more hospitable State (assuming that one is available) or they may attempt to secure better treatment by their current government. This is not to say that maltreatment of groups which lack a territorial base is justified. Rather, the concern is simply to point out that by attempting to remedy a condition of State-perpetrated injustice through secession, a group necessarily assumes a greater burden of justification than it otherwise would by, say, attempting to emigrate or change the government's policies. To summarise: "[w]hen a group seeks to secede, it is claiming a right to a particular piece of land, and one must necessarily inquire into why it is entitled to that particular piece of land, as opposed to some other piece of land – or to no land at all."[41]

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[37] Brilmayer (1991), pp.187-188.
[38] Buchanan (1991), pp.10ff.
[39] Brilmayer (1991), p.192.
[40] Brilmayer (1991), p.179.
[41] Brilmayer (1991), p.201.

In contrast, other theorists have attached very little, if any, importance to territory as a determinant in a group's moral right to secede. The most common reason given for doing so is the claim that territory is, and should be, only an issue in as much as people who live under the same government must necessarily live together.[42] In other words, the fact that the right to secede is exercised over a territory merely reflects the territorial organisation of our political world and that the State is therefore a *territorially defined* political entity.[43] Additionally, the point is also made that because this system of territorially bounded States arose by a process of political and military struggles, the territorial holdings of most existing States were generally attained through conquest and other nefarious means. Thus, because most States attained their territory through morally questionable means, it is difficult to see how they could have any moral right to that territory in the first place.[44]

B. Alternatives to the Territorial State

A corollary of the debate over the importance of territory to secession and a normative theory of secession is the question of whether alternative, non-territorial definitions of political sovereignty might not be preferable. Bishai, for example, claims that the whole problem with secession and the violence that usually accompanies it is due precisely to this link between political sovereignty and territory. Put simply, Bishai claims that territorial control as the modern form of political sovereignty, has created a perceived need amongst minority groups for secession as a solution to repressive

[42] Philpott, pp.370-71.

[43] See Avishai Margalit and Joseph Raz 'National Self-Determination' in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), p.458; Paul Gilbert, 'Prolegomena to an Ethics of Secession' in *Morality and International Relations*, ed. Moorhead Wright (Aldershot: Avebury, 1996), p.54; Simon Caney, 'National Self-Determination and National Secession: Individualistic and Communitarian Approaches' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.152-53; and Philpott, pp.370-71. To say that the State is a territorially defined entity is simply to say that the individuals who constitute the citizens of the State interact within a bounded geographical frontier, and recognise that the procedures which specify their *de facto* rights operate only within that bounded frontier, and outside the frontier either different or no procedures operate. See Terrence Moore, 'The Moral Standing of States' in *The Territorial Rights of Nations and Peoples*, John R. Jacobson (ed.) (Lewiston: Edwin Mellen Press, 1989), p.216. Also see Rickard who argues that a right to secede cannot be limited by obligations of distributive justice to the resources that can unilaterally be withdrawn from a State, as these obligations can only apply in a strong sense between members of the same political community, and the question of secession is precisely whether or not a group belongs to a larger political community (Rickard, p.503).

[44] See Jeffrey Reiman, 'Can Nations Have Moral Rights to Territory' in *The Territorial Rights of Nations and Peoples*, ed. John R. Jacobson (Lewiston: Edwin Mellen Press, 1989), p.164.

government.[45] Moreover, by removing the lifeblood and defining characteristic of the modern State (i.e. its territory) secession not only threatens to weaken the State both politically and economically, but also to re-define its very meaning and identity.[46] The solution to this, claims Bishai, is to separate sovereignty from territory and thus shift the debate from conflicts about territory – which is fixed and, thus, absolute – to sovereignty and its various features which are contingent and flexible.[47] Thus, what we need is a system of differentiated and overlapping citizenship that allows for simultaneous citizenship.[48]

Winfield, on the other hand, is of the opposite view and claims that a national territory is a necessary pre-condition for domestic justice – self-government requires some space within which its constitutive political and non-political activities can operate and this 'space' must, by definition, be a territorial one.[49] Similarly, Walzer argues that the link between people and land is not only a crucial feature of national identity, but for all practical purposes political society *must* be organised territorially as many critical issues of distributive justice are best resolved within geographical units (e.g. welfare, education and social life). Furthermore, claims Walzer, solutions where individuals are free to move around politically, carrying their political affiliations with them just as individuals carry their religious affiliation in a secular State, simply won't work as the

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[45] Bishai, p.95.

[46] Hence the reason why States often respond to secessionist demands in a repressive and brutal fashion. Bishai, p.94.

[47] Bishai, pp.107-8.

[48] Some theorists have compared such a form of government to the *Millet* system of the Ottoman empire. See, for example, Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), pp.156-58; Jay Sigler, *Minority Rights: A Comparative Analysis* (Westport: Greenwood, 1983); Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport: Greenwood, 1985), pp.74-75; and Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), p.29.

[49] Richard Dien Winfield, 'Territorial Rights' in *The Territorial Rights of Nations and Peoples*, ed. John R. Jacobson (Lewiston: Edwin Mellen Press, 1989), p.205. Jennings notes that people may feel a certain security in recognised, geographical frontiers which furnish the State with a recognised setting for its sovereign powers and those of other, similar entities beyond those frontiers. R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), p.2. A similar point is made by Buccheit who claims that the intensive social networks and exchange of goods and services required by a community pre-suppose a physical (i.e. territorial) base. See Lee Buccheit, 'The Logic of Secession', *Nations and Nationalism*, Vol.2, No.3, 1996. Also see K. Deutsch, *Nationalism and Social Communication: An inquiry into the Foundations of Nationality* (New York: Technology Press, 1953), pp.15-80.

national communities that are preserved under such arrangements came into being and were sustained on the basis of geographical co-existence in the first place.[50]

C. How Important is Territory to Understanding What Secessionists Want?

Before continuing on any further we should note that even if we accept, for whatever reason(s), the claim that the State must be a territorial entity, this does nothing to resolve the question of how large or what kind of territory any existing or would-be State requires. Indeed, it may even allow for the possibility of a nomadic State whose geographical borders are not fixed, but change over time. Establishing that a State needs a territory doesn't, in itself, demonstrate that this territory must remain constant over time.[51]

It is not the intention of this chapter to argue for or against the present territorial delineation of political sovereignty, not least of all because to do so would require an analysis greater than that which could be sustained within the allotted pages of this thesis. This is not to say that the issue of the non-territorial definition of political sovereignty is not an important or relevant concern. Clearly it is. However, the key issue as far as this thesis is concerned is whether or not a valid territorial claim is a necessary pre-condition for a right to secede. Thus, the following discussion will focus upon the significance of territorial sovereignty to the normative evaluation of existing secessionist movements, and the question of whether an alternative to the present territorial delineation of political sovereignty would be preferable will be put to one side. The intention is to demonstrate that while contemporary secessionist movements

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[50] Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), p.44. Also see Lea Brilmayer, 'Justifying International Acts', pp.71-72; and Steven Grosby, 'Territoriality: The Transcendental Primordial Feature of Modern Societies', *Nations and Nationalism*, Vol.1, No.2, 1995, pp.146-47. This apparent link between people and territory is often traced back to a historical change in the self-identification of individuals from medieval and pre-medieval times when peoples' primary identities were based upon the social group (e.g. clan or tribe) to which they belonged. In such times territory could, and usually was, understood only in terms of social relations and the juxtaposition of social groups. Gradually, however, there was a transference of identity from the group to its territory. Thus, where once a socially cohesive group defined its territory, in time the politically bounded territory came to define the people, leading the English historian Maine to remark: "England was once the country in which Englishmen lived: Englishmen are now the people who inhabit England." Sir Henry Sumner Maine, *Lectures on the Early History of Institutions* (London: Dawsons of Pall Mall, 1966), p.74. On this point also see David B. Knight, 'Identity and Territory: Geographical Perspectives on Nationalism and Regionalism', *Annals of the American Association of Geographers*, Vol.72, 1982, pp.516-17; and Bishai, pp.106-7.

do, indeed, contain a territorial claim, it does not follow from this that secessionist demands should therefore be normatively evaluated by reference to the notion of legitimate territorial sovereignty, or that there is anything to be gained by the inclusion of such a notion within the secession debate.

As was noted above, one claim is that territory is only relevant to the normative evaluation of secessionist movements because of the territorial organisation of our political world. Hence, when a group demands to secede it is merely making a *political* demand for *political* sovereignty, that then becomes a territorial claim because the degree of political sovereignty that the group in question desires is only attainable through independent Statehood – and the State, by definition, is a territorial entity. In other words, the claim to territory is merely an accidental by-product of the fact that the State is defined territorially. Replace the contemporary territorial delineation of political sovereignty with a non-territorial alternative and the issue of territory will necessarily be removed from the secession debate.

If, however, the claim that territory was not an issue for secessionists were true – and secession really *was* a purely political phenomenon – then it would follow that a secessionist group would be happy with *any* territory, *anywhere*, in which to set up a State.[52] Yet this is clearly *not* the case as for most, if not all, separatist groups the demand to secede is *territory-specific*. In other words, what contemporary secessionist movements desire is not *a* territory in which they may set up their own State but, rather, *this particular* territory. The Palestinians, for example, do not just want *a* Palestinian State, but a Palestinian State *in Palestine*, just as the Kashmiris want a Kashmiri State *in Kashmir* and the East Timorese an East Timorese State *in East Timor*.[53] To ignore this fact is to fundamentally misunderstand what it is that these groups are demanding. In summary: the fact that the State is a territorially defined entity may compel groups

[51] Winfield, p.205.

[52] Providing of course that the territory's location and natural resources were sufficient to sustain a reasonable standard of living.

[53] Jacob T. Levy, 'Blood and Soil, Place or Property: Liberalism, Land and Ethnicity', Presentation at a Current Research Workshop at the Institute for Humane Studies, George Mason University, 1998. Also note the failure of attempts after the Second World War to convince Jews that they might like to establish a Jewish State somewhere other than in Palestine.

seeking to establish their own State to lay claim to a territory, but it doesn't explain why they claim this or that particular territory.

Of course, some territories could not support an independent State and would be out of the question because of their location and/or lack of natural resources. We could not, for example, reasonably expect the Kashmiris to accept an offer to set up a Kashmiri State in, say, the barren wilderness of Australia's Simpson Desert or on the Antarctic ice flows. On the other hand, however, if Kashmiris were offered a portion of, say, the east coast of the United States in which to set up a sovereign, independent State of Kashmir then they would presumably also reject the offer. This is despite the fact that the east coast of the United States is considerably richer in natural resources than Kashmir and that, in the long-term, this would off-set any costs incurred by migrating there. Such factors are, I suspect, largely irrelevant to the Kashmiris and other groups like them. Rather, what they want is an independent, sovereign State *in Kashmir*.

The fact that groups such as the Kashmiris claim a specific territory in which to set up an independent State, even at the cost of refusing other alternative territories capable of providing them with a higher standard of living, indicates that territory *is* important to understanding what a group wants when it demands the right to secede. On the other hand, however, for reasons explained below it does not follow from this that the justifiability of a group's desire for secession should be dependent upon that group successfully demonstrating that it has so-called 'legitimate sovereignty' over the territory that it covets. Put simply, as far as the issue of a moral right of secession is concerned, the notion of legitimate territorial sovereignty is a red herring that, if anything, only succeeds in needlessly confusing matters and complicating the debate over a right to secede.

D. The Normative Importance of Territory to Secession

Above it was pointed out that in many respects Buchanan's account of the importance of legitimate territorial sovereignty is premised upon the analysis of Brilmayer. Note, however, that while Buchanan *agrees* with Brilmayer that a sound justification for secession must include a valid territorial claim, the two *dis*agree over how such a claim

may be successfully established. Whereas Brilmayer claims that a legitimate territorial claim exists if, and only if, the territory in question was wrongly taken from the secessionists at some time in the past, Buchanan believes that secession may also be justified in situations where it is the only available remedy for conditions of distributive injustice or possible extermination.[54] Thus, while there is *agreement* that in order to possess a right to secede a group must first have legitimate sovereignty over (or valid title to) the territory which they covet, there remains *dis*agreement over how one might establish such sovereignty or title.

This disagreement is indicative of the fact that making a valid territorial claim a necessary pre-condition for the possession of a moral right to secede simply succeeds in changing the question from 'Under what conditions does a group possess a moral right to secede?' to 'Under what conditions does a group possess legitimate territorial sovereignty?' Thus, disputes over the conditions under which a group possesses a moral right to secede, are simply transformed into disputes over the nature of legitimate territorial sovereignty and the conditions under which a group possesses it.[55] Furthermore, the notion of legitimate territorial sovereignty does not contain within itself the means by which such disagreement may be resolved, i.e. making legitimate sovereignty over territory a necessary pre-condition for a right to secede neither tells us what legitimate territorial sovereignty is, nor how a group may acquire or lose it.

Consider, for example, the theory of David Gauthier which, as a fairly standard example of a LD theory of secession, claims that if most of the people inhabiting a particular region wish to secede and establish their own separate State then, subject to certain side constraints, they should be permitted to do so.[56] To claim that Gauthier's theory is unsatisfactory because it does not require would-be secessionists to possess legitimate sovereignty over the territory which they intend to remove from the State's control, is simply to beg the question of what the group would have to do to acquire such sovereignty in the first place.

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[54] See Buchanan (1991), p.23.

[55] i.e. making a valid territorial claim a necessary pre-condition to the possession of a moral right of secession simply succeeds in shifting the disagreement from when a group has a moral right to secede, to when a group has legitimate sovereignty over a given territory.

[56] See David Gauthier, 'Breaking Up: An Essay on Secession', *Canadian Journal of Philosophy*, Vol.24,

Just as the requirement that a group be the victim of an injustice if it is to possess a right to secede does not, in itself, tell us exactly *which* injustices are sufficient to generate such a right, so simply making legitimate title to a territory a necessary pre-condition for a right to secede fails to specify the conditions under which such title exists.[57] Hence, Gauthier may simply claim that by demonstrating that a majority of a territory's residents desire to secede (e.g. by holding a plebiscite on the issue) one has also shown that they possess legitimate sovereignty over that territory. There is nothing intrinsic to the notion of legitimate territorial sovereignty which establishes that this majoritarian definition of territorial sovereignty is any better, nor any worse, than other, rival definitions. Thus, to do as Buchanan does, and make a distinction between the State's authority over its subjects and its authority over its territory – and on the basis of this distinction argue that the territorial claim is crucial because the secessionists are taking territory that *belongs* to the State – is meaningless without an accompanying theory of legitimate territorial sovereignty.

Buchanan's response to this difficulty is to offer an agent/trustee model of territorial sovereignty where the State does not possess a direct property right in its territory but, rather, merely acts as the agent of the people who are the *principal* in the political unit. However, this agent/trustee model of territorial sovereignty raises more questions than it answers. To claim that the State is merely the agent of the people and that it administers the peoples' territory on their behalf, is to beg the question of, not only who the principal in such a relationship is,[58] but also what the terms of this agent/trustee agreement are. Buchanan claims that the agreement can only be voided or overridden in the three situations of a lethal threat, discriminatory re-distribution and rectificatory justice. However, there is nothing inherent to an agent/trustee model of territorial sovereignty that stipulates that these three, and only these three, reasons are sufficient to generate a legitimate claim to territorial sovereignty.

No. 3, September 1994, p.369.

[57] Also see Kymlicka who questions why should we start from the assumption that the State already possesses legitimate title to its territory and, hence, that the burden of justification therefore falls upon the secessionists rather than the State of which they are a constituent component. Will Kymlicka, 'Buchanan, Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec', *Political Theory*, Vol.20, No.3, 1992, p.532.

[58] i.e. *all* the people in the State or just a sub-section of them?

More importantly, Buchanan's account leaves it unclear as to whether: (a) the authority which the State exercises over its territory, by virtue of being the agent of the people who live in that territory, then *gives rise* to authority over the people in that territory; or (b) whether the State's claim to authority over its subjects is *additional* to its authority over their territory – in which case where *does* it come from?[59] Indeed, if, as Buchanan suggests, the people are the principal in the political unit and the State merely their agent, then it is unclear why we even need a distinction between the State's authority over its citizens and the territory that they occupy. As Beran has noted, if the State is merely the agent of the people then the primary right to the territory of the State must belong to the people, not the State. In which case, why can't "...part of the people sack the agent and appoint a new one, independent from the previous agent, in its part of the territory?"[60]

3.3 MINIMAL REALISM

A. Introduction

Putting aside the question of legitimate territorial sovereignty as a pre-condition for the possession of a right to secede, the main question as far as Buchanan and this chapter are concerned is 'Why are JC theories of secession necessarily superior to other, alternative theories?' Buchanan, of course, thinks that JC theories – or, more precisely, *his version* of a JC theory – *is*, indeed, superior to other rival theories and in an influential and widely publicised article[61] has set out a number of reasons why this is so. The purpose of this and the two following sections is to critically examine these claims.

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[59] I am indebted to Conal Smith for making this point clear to me.

[60] Harry Beran, 'The Place of Secession in Liberal Democratic Theory' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994), p.61. Also see Scott Boykin, 'The Ethics of Secession' in *Secession, State and Liberty*, ed. D. Gordon (New Jersey: Transaction, 1998), p.76.

[61] See Allen Buchanan, 'Theories of Secession', *Philosophy and Public Affairs*, Vol.26, No.1, 1997. The same article has since re-appeared, albeit in a slightly re-worked format, entitled 'The International Institutional Dimension of Secession' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998). Also see Allen Buchanan, 'Democracy and Secession' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998) where the same ideas find re-expression.

Buchanan's defence of JC theories begins with a distinction between what he sees as two very different normative questions about secession:

1. "Under what conditions does a group have a moral right to secede, independently of any questions of *institutional* morality, and in particular apart from any consideration of international legal institutions and their relationship to moral principles?"[62]

2. "Under what conditions should a group be recognized as having a right to secede as a matter of institutional morality, including a morally defensible system of international law?"[63]

Buchanan explains further that while both are ethical questions, the former is "...posed in an institutional vacuum and, even if answerable, may tell us little about what institutional responses are (ethically) appropriate. The second is a question about how international institutions, and especially international legal institutions, ought (ethically) to respond to secession."[64] Thus, *institutional moral reasoning* evaluates political principles in terms of the institutions that they would justify while taking into consideration the effects of these institutions in society. Conversely, *non-institutional moral reasoning* takes certain basic principles such as freedom of association and claims that if we are to accept these principles then we must accept the principles of secession that are their corollaries.[65]

Buchanan expresses a preference for institutional moral reasoning which he defends by claiming that secession crises tend to have *international* consequences that require *international* responses. Furthermore, "[i]f these international responses are to be consistent and morally progressive, they must build upon and contribute to the development of more effective and morally defensible international institutions,

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[62] Buchanan, 'Theories of Secession', pp.31-32.

[63] Buchanan (1991), p.32.

[64] Buchanan (1991), p.32.

[65] Wayne Norman, 'The Ethics of Secession as the Regulation of Secessionist Politics' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), pp.44-45.

including the foremost of these, the international legal system."[66] Moreover, claims Buchanan, when we think about the morality of secession in a procedural context, we will discover that JC theories are the superior alternative.

Clearly this distinction between institutional and non-institutional moral reasoning is both an important and contentious one which, in many respects, Buchanan appears to take for granted. The main question, however, as far as Buchanan and this thesis are concerned, is whether this model of institutional reasoning supports Buchanan's conclusion that JC theories are superior to other, rival theories.[67] The purpose of the ensuing discussion is to demonstrate that Buchanan's case for the superiority of JC theories is inconclusive. First, however, it is necessary to define certain terms employed by Buchanan and clear up some areas of confusion.[68]

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[66] Buchanan (1991), p.33.

[67] Wayne Norman has recently offered what is perhaps the most thorough defence of a preference for institutional reasoning as far as a right of secession is concerned. Norman claims that some issues are so bound up with the apparatus and nature of the state that they cannot be thought through with criteria that ignore this wider institutional context (Norman, pp.47-50). Other writers such as Nielsen and Miller have, however, raised serious doubts about the subordination of non-institutional reasoning, or so-called *ideal theory* to institutional reasoning, or *real theory*. For example, Nielsen points out that if we are to institutionalise a certain principle, or rule, then we will need a theory prior to the existing institutional structure that tells us what that principle or rule is, and why it is justified and hence should be institutionalised in the first place. Moreover, to begin with existing institutions in order to determine whether or not there exists a right of secession – and thus assume the limits of the institutionally possible right from the start – is also to legitimise the injustices and imperfections that characterise those institutions and the world as a whole. See Kai Nielsen, 'Liberalism, Nationalism and Secession' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), p.129. Furthermore, even if the issue of a given group's secession *is* to be decided in accordance with certain procedures, we still need an 'ideal' theory which tells us in broad terms when secession is un/justified and thus guides us in our thinking about secessionist claims. See David Miller, 'Secession and the Principle of Nationality' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), p.64. Indeed, procedural mechanisms for settling secessionist disputes are likely themselves to be based upon certain 'background claims' about why that particular procedure is appropriate in those circumstances (Nielsen, p.131; and Miller, p.64). Finally, even if institutions in the real world *can* only approximate certain ideal principles, we still need to identify what these ideal principles are in order to determine how real institutions may be amended so that they mirror as closely as is possible what is set out in the ideal theory. One would, for example, be hard pressed to identify an existing State which is a perfect instantiation of an ideal liberal democracy, but this does not mean that the liberal democratic ideal and the theory upon which it is based should therefore be done away with (Nielsen, p.131; and Miller, p.64).

[68] While many of these terms refer to theories and concepts already introduced in this and the previous chapter under different labels, in order to avoid any possible confusion Buchanan's terminology will be employed for the remainder of the current chapter.

Buchanan draws a distinction between two different types of normative theory of secession, the first of which he terms *Remedial Right Only* (RRO) theories.[69] RRO theories correspond to what until now have been termed JC theories and, thus, assert that a group has a right to secede if, and only if, it is the victim of certain specified injustices. The second type of normative theory identified by Buchanan are *Primary Right* (PR) theories which, conversely, assert that certain groups can have a right to secede that is not "...derived from the violation of other, independently characterizable rights."[70]

PR theories are then divided up into two different types: (a) *Ascriptive Group* theories which claim that only those groups whose memberships are defined in terms of characteristics that exist independently of any actual political association that the members of the group may have forged may possess a right to secede;[71] and (b) *Associative Group* theories that focus instead on the voluntary political choice of (a majority of) the members of a group and their decision to form their own independent political unit.[72] Clearly, Ascriptive Group theories refer to what have thus-far been termed *Nationalist* theories of secession, whereas Associative Group theories refer to LD theories of secession. Buchanan's aim is to demonstrate that RRO theories are superior to their two theoretical competitors, particularly Associative Group, or LD, theories of secession.[73]

Having stipulated that the right to secede should be understood as an institutional right, Buchanan then identifies three criteria for "...the comparative assessment of

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[69] See Buchanan, 'Theories of Secession', pp.34ff.

[70] Buchanan, 'Theories of Secession', p.39. In other words, secession is not limited to being a means of remedying an injustice. Refer, Buchanan, 'Theories of Secession', pp.34-35.

[71] e.g. shared language, culture, history and sense of being a nation. Buchanan, 'Theories of Secession', p.38.

[72] i.e. the right to secede is an instance of the right of political association and any group, no matter how heterogenous, may possess a right to secede. Buchanan (1997), pp.38-39.

[73] Elsewhere Buchanan also uses the label 'Plebiscitory Right' to refer to this same type of theory. Refer Allen Buchanan, 'Democracy and Secession.' Buchanan's main target is the theory of Christopher Wellman. Christopher H. Wellman, 'A Defence of Secession and Political Self-Determination', *Philosophy and Public Affairs*, Vol.24, No.2, 1995. However, most, if not all, of the criticisms he levels against Wellman are applicable to other Associative Group theorists such as Beran and Gauthier.

competing proposals for how international law ought to understand the right to secede…"[74] which he claims demonstrate the superiority of RRO theories:

1. *Minimal Realism*: Does the theory have a good prospect of eventually being adopted through the processes by which international law is made?[75]

2. *Avoidance of Perverse Incentives*: Does the theory create perverse incentives, i.e. encourage behaviour which undermines morally sound principles of international law or morality?[76]

3. *Moral/Legal Consistency*: Is the theory consistent with the *more morally acceptable* principles of existing international law?[77]

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[74] Buchanan, 'Theories of Secession', p.41.

[75] Buchanan, 'Theories of Secession', p.42.

[76] Buchanan, 'Theories of Secession', pp.43-44.

[77] Buchanan, 'Theories of Secession', p.42. Note that Buchanan also identifies a fourth criterion of *Moral Accessibility* (i.e. is the theory based upon moral principles which are not group specific but rather have broad cross-cultural appeal?) but is less certain that RRO theories have any significant advantage as far as it is concerned. For reasons of brevity the remaining three criteria which Buchanan believes clearly *do* demonstrate the superiority of RRO theories will be focussed upon. Another, additional argument considered by Buchanan in favour of RRO theories is based upon a consequentialist analysis concerning the harmful consequences of taking an action which, *ceteris paribus*, when considered in isolation would be justified and then, on the basis of this moral fact, creating a rule that says that all such actions in the same or similar circumstances would also be justified. In order to illustrate the argument Buchanan gives a common example from the field of bioethics where a physician is considering whether or not to administer a lethal injection to a patient in a permanent vegetative state. Considered in isolation – i.e. in terms of act-consequentialist-type *case-by-case* reasoning – Buchanan argues that we might conclude that the physician would be justified in administering the injection. This, however, does not mean that we should generalise our decision by making a rule that allows physicians to exercise their judgement as to whether they should administer lethal injections to patients in a permanent vegetative state. This is because creation of a rule that legitimised acts of active, non-voluntary euthanasia would have certain knock-on effects that would be prohibitively negative, e.g. it might encourage doctors to kill in situations unlike that described above (perhaps where the patient, unbeknown to the doctor, actually stood a good chance of recovery – an argument from epistemic fallibility); it might encourage individuals to engage in other acts that have bad consequences; and it might discourage certain people from undertaking a medical career or undermine the doctor-patient relationship. Thus, argues Buchanan, general recognition of a right to secede – i.e. the institutionalisation of such a right – might create certain harms that make the official recognition of such a right prohibitively costly (Buchanan, 'Theories of Secession', pp.57-59). Buchanan's argument here is a fascinating one that raises many complex issues which are worthy of more lengthy treatment than the present project allows. Briefly, however, it is worth pointing out that Buchanan's analysis is ambiguous in the sense that it is unclear whether he believes that the initial, one-off case would be justified or not. Presumably, however, Buchanan would allow the initial case of doctor-assisted suicide as being justified for, if it were not, then what possible reason could there be for creating a rule that institutionalised such a practice? If, indeed, this is the case, then it seems that there are clear resonances of the act *versus* rule consequentialist debate which may be relevant here. This in turn may also indicate where consideration of this particular component of Buchanan's case against RRO theories, needs to be linked into a larger project detailing the assessment of an action's moral status and the weight attached to an action's consequences within that assessment. Reluctantly, pressures of space require that

B. The Problems with a State-Based Legal Order

Beginning with the criterion of Minimal Realism, Buchanan argues that because a PR theory places 'greater emphasis' upon the right of groups to secede, States will therefore be less likely to incorporate it into international law:

> Primary Right theories are not likely to be adopted by the makers of international law because they authorize the dismemberment of states even when those states are perfectly performing what are generally recognized as the legitimating functions of states. Thus Primary Right Theories represent a direct and profound threat to the territorial integrity of states – even just states. Because Remedial Right Only Theories advance a much more restricted right to secede, they are less of a threat to the territorial integrity of existing states; hence, other things being equal, they are more likely to be incorporated into international law.[78]

Perhaps, at this stage, it would be worthwhile to briefly examine exactly what existing international law *does* have to say on the issue of secession. Most secessionist movements aim to establish their own, independent State. According to Article One of the 1933 *Montevideo Convention on the Rights and Duties of States* a State is legally defined as having: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other States.[79] Elsewhere international law allows for the creation of *new* States as a result of: (a) the granting of independence; (b) the dissolution of an empire or federation; (c) the merger of two or more political units; (d) partition; or (e) independence.[80]

On the other hand, however, existing international law is largely silent on the issue of secession, i.e. it neither condemns secession nor provides for any right to secede.[81]

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further comment on this matter be left for elsewhere.

[78] Buchanan, 'Theories of Secession', p.45.

[79] See Asbjorn Eide, 'In Search of Constructive Alternatives to Secession' in *Modern Law of Self-Determination*, ed. Christian Tomuschat (Dordrecht: Martinus Nijhoff, 1993), pp.139-40; and James Crawford, *The Creation of States in International Law* (Oxford:Clarendon Press, 1979), p.36.

[80] Alexis Heraclides, 'Secession, Self-Determination and Non-Intervention', *Journal of International Affairs*, Vol.45, No.2, 1992, p.403.

[81] i.e. secession is neither legal nor illegal under international law. It is true that articles 1(2) and 55 of the United Nations Charter list the 'self-determination of peoples' as one of the UN's goals. Moreover the UN General Assembly Resolution 1514 (*Declaration on the Granting of Independence to Colonial Countries and Peoples*, G. A. Res. 1514, 15 U.N. GAOR Supp. No.16 at 66, 67 U.N. Doc.A/4684 1960), the UN *International Covenant on Civil and Political Rights* of 1966 (adopted Dec.16, 1966, art.1, para.1, 997 U.N.T.S. 171, 173) and the *International Covenant on Economic, Social and Cultural Rights* (adopted Dec.16, 1966, art.1, para.1, 993 U.N.T.S. 3, 5) state that all peoples have the right to self-

While the United Nations (UN) Security Council has characterised certain secessions as being illegal (e.g. those of Katanga and Rhodesia) this does not indicate the existence of any legal rules prohibiting secession.[82] Indeed, international law has tended to be heavily biased towards the *status quo* and to 'let sleeping dogs lie.'[83] Notwithstanding the recent 'watering down' of the inviolability of a State's territorial sovereignty – especially with respect to the enforcement of human rights (e.g. in cases such as the Iraqi Kurds and the Albanian Kosovars) – international legal principles *generally* recognise as valid a State's right to its *de facto* territorial holdings however it has come by them.[84] In the few situations where international law *has* recognised a State created by secession, it has usually done so only *after* that State's creation was very much a *fait accompli*. As Jennings notes, the main method for a nascent State to establish legal title to the territory that it covets remains *actual possession*.[85]

The conservative nature of international legal institutions and their bias towards the territorial integrity of existing States forms the basis of one of the main objections to Buchanan's criterion of minimal realism and, indeed, institutional reasoning in general. The objection states that while States remain the basic actors in the international legal order the stability of existing States is not merely in the interests of all States, but also in the interests of the international legal order as a whole. A State-based legal order cannot contain a rule that leads to the destruction of most States,[86] as organisations such as the UN would be placed in an awkward position if they were to: (a) condone threats to the territorial integrity of their member States;[87] and/or (b) interpret the right of self-determination in such a way as to invite or justify attacks upon the territorial integrity of their own members.[88] Similarly, at the domestic level, most multi-national

determination and, by virtue of that right, they should be free to freely determine their political status and pursue their economic, social and cultural development. The problem is, however, that the term 'peoples' is not adequately defined and, as we shall shortly see, has historically only been taken to apply in the case of anti-colonial movements and their struggle for independence.

82 Crawford, pp.266-68.

83 Jennings, p.70.

84 And despite the fact that most of the world's international borders have been established by conquest and other nefarious means. Reiman, pp.168-71.

85 Jennings, p.86.

86 Dietrich Murswiek, 'The Issue of a Right of Secession Reconsidered' in *Modern Law of Self-Determination*, ed. Christian Tomuschat (Dordrecht: Martinus Nijhoff, 1993), p.36.

87 Heraclides, p.402.

88 David B. Knight, 'Territory and People or People and Territory? Thoughts on Postcolonial Self-

States are governed by majority groups that have no interest in sanctioning institutional mechanisms that would facilitate a sub-unit's secession. In summary: because international and domestic law is both made and enforced by States that have an interest in never sanctioning any institution that could encourage their dismemberment, the fact that governments will not enact secession procedures, or would behave perversely if they were enacted, does not prove that these procedures are unfair or unjust.[89]

Buchanan's response to this counter-argument is to claim that it falsely assumes that States have no morally legitimate interest in resisting dismemberment. Rather, argues Buchanan, States *do* have a morally legitimate interest in resisting secessionist movements and preserving their territorial integrity, as doing so promotes the two following morally important goals.[90]

1. *The Physical Protection of Individuals and the Preservation of Their Rights*: Each individual's rights and physical security depend upon the effective enforcement of a legal order, and effective enforcement requires effective *jurisdiction* which in turn requires "...a clearly bounded territory that is recognised to be the domain of an identified political authority."[91]

> ...observance of the principle of territorial integrity facilitates the functioning of a legal order and the creation of the benefits that *only a legal order can bring*. Compliance with the principle of territorial integrity, then, does not merely serve the self-interest of states in ensuring their own survival; it furthers the most basic morally legitimate interests of the individuals and groups that states are empowered to serve, their interest in the preservation of their rights, the security of their persons, and the stability of their expectations.[92]

Determination', *International Political Science Review*, Vol.6, No.2, 1985, p.261; and Eide, pp.147-48. Indeed, as alluded to above, the UN position has generally been that it is legitimate for people subjected to colonial rule to seek self-determination, but not for a people who form a minority within a national territory to seek it. In other words, the principle of self-determination is taken to justify the independence of colonial territories, but a sub-section of the people who compose this new State cannot claim the same right of self-determination in order to secede and create a third State. See Anna Michalska, 'Rights of Peoples to Self-Determination in International Law' in *Issues of Self-Determination*, ed. William Twining (Aberdeen: Aberdeen University Press, 1991), p.82; and Brilmayer (1991), pp.182-83.

89 See Norman, p.45.

90 See Buchanan, 'Theories of Secession', p.46.

91 Buchanan, 'Theories of Secession', pp.46-47.

92 Buchanan, 'Theories of Secession', [emphasis added], p.47.

2. *Political Participation Incentive Structure*: This argument may be broken down into two, inter-related claims: (a) maintenance of a State's territorial integrity creates stability and this stability is necessary to ensure individual political participation; and (b) "...where exit is too easy, there is little incentive for voice – for sincere and constructive criticism and, more generally, for committed and conscientious political participation."[93] For example, "...if a minority could escape the authority of laws whose enactment it did not support by unilaterally redrawing political boundaries, it would have little incentive to submit to the majority's will, or to reason with the majority to change its mind."[94] Moreover, even if a group does not exercise its right to secede, it may still undermine the democratic process by using its possession of this right as a strategic bargaining tool and threatening to secede unless it gets its own way, in which case the right to secede becomes an effective minority veto.[95]

C. The Physical Protection of Individuals and the Preservation of Their Rights

Beginning with the former claim, Buchanan's argument may be summarised as follows: (a) the realisation by individuals of fundamental moral values requires a certain moral environment;[96] (b) political authority exercised by the State is a *necessary* means of providing such an environment;[97] finally, (c) "[e]ven if political authority strictly speaking is exercised only over persons, not land, the effective exercise of

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[93] Buchanan, 'Theories of Secession', p.48. Also see Albert O. Hirschman, *Exit, Voice and Loyalty* (Cambridge: Harvard University Press, 1970).

[94] Buchanan, 'Theories of Secession', p.48.

[95] Buchanan, 'Theories of Secession', p.48. There is also the associated claim that if a group assents to be governed democratically then they cannot justifiably back out of that agreement once they find themselves in a minority and a decision goes against them. The right to voice one's dissent without fear of retribution negates a need for the right to secede. See Anthony H. Birch, 'Another Liberal Theory of Secession', *Political Studies*, Vol.32, No.4, 1984. The problem, however, with such an argument is that it means that one generation's consent may bind all subsequent generations in an irrevocable contract. See Harry Beran, 'A Liberal Theory of Secession', *Political Studies*, Vol.32, No.1, 1984, p.25 and 'More Theory of Secession: A Response to Birch', *Political Studies*, Vol.36, No.2, 1988. It is also claimed that it is undemocratic to enable the interests and wishes of the majority – who oppose secession – to be overridden by a secessionist minority. See D. Goldstick, 'The National Right to Self-Determination' in *Philosophers Look at Canadian Confederation*, ed. Stanley G. French (Montreal: Canadian Philosophical Association, 1979), p.137.

[96] i.e. a state of affairs characterised by order, stability and security of person.

[97] i.e. only the State (through the selective use of its associated legal machinery) is able to alter human behaviour so as to eliminate those forms of anti-social individual action which are antithetical to a moral environment.

political authority over persons depends, ultimately upon the establishment and maintenance of jurisdiction in the territorial sense... Furthermore, if an effective legal order is to be possible, both the boundaries that define the jurisdiction and the identified political authority whose jurisdiction it is must persist over time."[98]

Even if we accept Buchanan's claim that the realisation by individuals of fundamental moral values requires a certain moral environment, why should we accept that the State is a *necessary* means of producing that environment? There may be institutions other than the State (which employ measures other than legal sanctions) that are *at least* equally effective as the State in the provision of a moral environment. One may, for example, conceive of a State-less society which, though it lacks a legal and political system, is still able to produce a stable moral environment through the promulgation of certain religious teachings that proscribe anti-social behaviour.[99] Allowing that the State is, or may be, an *effective* means of producing a moral environment[100] does not demonstrate that it is the *only*, or the *best* means of doing so.

Moreover, why should the State's ability to provide a moral environment require the maintenance of its territorial integrity? If G secedes from S then *of course* the scope of S's effective exercise of authority no longer includes G. The whole point of secession is, after all, to remove the seceding region from the effective authority of the parent State. However, it does not follow from this that G's secession will necessarily have a deleterious affect upon S's exercise of authority (and hence ability to provide a moral environment) within its remaining territory. Indeed, through the removal of a restive and rebellious sub-region secession may actually have a *beneficial* affect upon the State's exercise of authority in its remaining regions. Secessionist conflicts and the counter-insurgency strategies employed by States to combat them, typically prove to be a major drain on a State's resources and often lead to the State behaving in a less liberal way towards its citizens, than it would in other circumstances. Allowing a restive sub-group to secede may in some situations therefore free-up a considerable amount of

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[98] Buchanan, 'Theories of Secession', p.47.

[99] See, for example, Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983).

[100] i.e. the moral environment produced by the State is superior to that which would result in a state of nature (a State-less environment).

resources and manpower that may be put to more constructive use in the remainder State, while also encouraging the State to behave in a more liberal fashion.

Most importantly, if we accept Buchanan's argument that the legitimacy of the State's interest in maintaining its territorial sovereignty is justified *teleologically* by reference to its ability to secure a moral environment, then any group whose secession would result in a state of affairs which was instrumentally superior in the provision of a moral environment must consequently possess a right to secede.[101] Therefore, it is difficult to see how Buchanan can consistently claim that the right of the State to maintain its territorial integrity is justified teleologically, while at the same time arguing that a group possesses a right to secede *only* where it has been the victim of the three injustices he specifies. What reason is there to suppose that the *only* instances of secession which will result in an overall gain in efficiency in the provision of a moral environment, are those in which the seceding group has been the victim of these three injustices?

D. Political Participation Incentive Structures

Buchanan's second argument in support of the claim that States have a morally legitimate interest in preserving their territorial integrity is based upon a claim that if it is too easy for a group to secede from a State, then this will undermine the democratic processes within that State. The argument contains two inter-related claims, both of which aim to demonstrate that adherence to the principle of the territorial integrity of existing States helps to support the 'integrity' of individual political participation within democratic States.[102] The first claim states that the principle of territorial integrity contributes to the stability of both the effective jurisdiction of the laws created by a State's political processes, and the membership of that State – both of which are prerequisites to individuals 'investing' themselves in participating in the political processes of a State.[103] The second claim states that a right to secede may serve as an

[101] Wellman points out that under a teleological justification of the State, S possesses a right to secede from R where "...not only would S be able to perform more efficiently the function of government separate from R, but R-S would also experience greater efficiency (or at least no appreciable decrease in efficiency)." See Wellman, pp.157-58.

[102] See, for example, Buchanan, 'Theories of Secession', p.49.

[103] Buchanan, 'Theories of Secession', pp.47-48.

effective minority veto and undermine the democratic process by giving small, minority groups a disproportionate degree of political influence.

Beginning with the former claim, Buchanan writes:

> ...the ability of representative institutions to approximate the ideal of deliberative democracy, in which citizens strive together in the ongoing articulation of a conception of the public interest, also depends, in part, upon stable control over a definite territory, and thereby the effective exercise of political authority over those within it. This stability is essential if it is to be reasonable for citizens to invest themselves in cultivating and practicing the demanding virtues of deliberative democracy.[104]

Elsewhere Buchanan claims:

> Where the principle of territorial integrity is supported, citizens can generally proceed on the assumption that they and their children and perhaps their children's children will be subject to laws that are made through the same processes to which they are now subject – and whose quality they can influence by the character of their participation.[105]

Buchanan appears to be saying that each individual's political participation is aimed towards a certain end – i.e. influencing the content of the laws to which they are subject and the political processes through which those laws are made.[106] In other words, people engage in political activities, not because they find doing so intrinsically enjoyable, but because it is an instrumentally effective means of altering the State's policies. Therefore, given that engaging in these political activities will frequently require a not insubstantial investment in terms of time and resources, political participation remains a rational course of action only as long as there is a reasonable probability that it will achieve these aims.

Moreover, where there is a continual threat of secession people will no longer have an incentive to participate in the political processes. To put it rather crudely, if I cannot be certain that I will continue to live under the authority of a particular government,

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[104] Buchanan, 'Theories of Secession', pp.48-49.

[105] Buchanan, 'Theories of Secession', pp.47-48.

[106] See Buchanan, 'Theories of Secession', pp.47-48.

then I have no incentive to attempt to alter the policies of that government. Moreover, because democratic government (which is taken to be a good thing) is founded upon the principle of the political participation of individual citizens, anything that quantitatively or qualitatively reduces that participation necessarily harms democratic institutions. Consequently, Buchanan concludes that adherence to the principle of the territorial integrity of existing States strengthens the institution of democratic government by ensuring continued participation in existing political processes. Furthermore, because a RRO theory places substantially greater emphasis upon the principle of territorial integrity than a PR theory it is therefore a superior theory.

In response to Buchanan's analysis there are five points to be made. First, if the goal is to democratise States by providing an incentive for people to participate in established political processes, secession may be an instrumentally effective means of securing such an outcome. Where a State contains a dominant majority group and one or more permanent minorities, then the majority may have no interest in engaging in principled dialogue with members of the minority groups and may instead simply disregard their interests and views. As Buchanan admits, people participate in political processes with an end in mind; they expect to gain something from their participation for themselves and/or their community. However, if members of minority groups know in advance that their participation in a State's democratic institutions will yield no concrete results due to their being consistently ignored or out-voted, then they will have little incentive to engage in such participation.

Buchanan rejects PR theories of secession because he believes they give groups a disproportionate degree of political influence in the democratic process – a point which will be addressed shortly. The other side of the coin, however, is that a right to secede may be an effective means of addressing situations of minority neglect and ensuring that the majority treats minority groups justly and equitably. Given that a minority's secession would, at the very least, inconvenience the dominant majority, by issuing a credible threat of secession a minority may be able to force the majority to take its interests and views (more) seriously. Thus, by ensuring that the political participation of minority groups will not be in vain, a right of secession may actually serve to

increase political participation in democratic States by giving members of minority groups the necessary incentive to invest themselves in such participation.[107]

Second, even if people *are* aware that at some time in the future either they, or the inhabitants of another region within their State, may secede, these people will still have immediate economic, political and social interests which may be furthered through participation in established democratic institutions. Not only is (the threat of) secession unlikely to eliminate or diminish these interests and the vigour which with they are pursued, but it may actually *increase* it by bringing certain issues to the fore. In Canada, for example, the continuing question of Quebec's secession has stimulated, rather than diminished, political debate both within Quebec and the remainder of Canada on a variety of issues raised by Quebec's possible secession. If the concern is merely to increase levels of political participation, then an emotionally charged topic such as secession may be just the tonic for lacklustre democracies which continue to witness increasing voter apathy.

Third, it is not immediately obvious *why* individual political participation in a State should require a considerable degree of stability in the membership of that State.[108] Secession is not the only means by which a State's membership may be altered. Indeed, the membership of most contemporary States – both democratic and non-democratic – is in a continual state of flux due to the ceaseless emigration of existing citizens to other States and, of course, the immigration of new citizens from foreign States. There is, to my knowledge, no evidence to suggest that such factors necessarily have any adverse effect upon levels of political participation.

Fourth, not all instances of secession may be equal in the harm that they do to levels of political participation. In other words, just because a RRO theory *may* (or may *not*)

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[107] On this point see Harry Beran, 'A Democratic Theory of Political Self-Determination for a New World Order' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.54; David Gordon, 'Introduction' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998), p.x; Steven Yates, 'When is Political Divorce Justified?' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998), pp.38ff; Boykin, p.75; and Robert W. McGee, 'The Theory of Secession and Emerging Democracies: A Constitutional Solution', *Stanford Journal of International Law*, Vol.26, No.2, 1992, p.463. A similar point may also be made with respect to the importance of allowing individuals a right of emigration. See, for example, Jeremy Shearmur, *Hayek and After* (London: Routledge, 1996), pp.204-6.

justify a lesser *number* of secessions than a PR theory, it does not necessarily follow from this that a RRO theory will do less *damage* to the institution of democratic government. At one point Buchanan attempts to justify the emphasis which a RRO theory places upon maintaining the territorial integrity of existing States by claiming that "...the majority of secessions have resulted in considerable violence, with attendant large-scale violations of human rights and massive destruction of resources..."[109] Furthermore, claims Buchanan, "...when an ethnic minority secedes, the result is often that another ethnic group becomes a minority within the new state and all too often the formerly persecuted become the persecutors."[110] Thus, the condition of injustice which led to a group's secession in the first place may simply be replicated, and indeed magnified, within the boundaries of the new State created by secession. Buchanan claims that because his theory contains restrictions upon the right to secede which those of Wellman, Gauthier and Beran do not, it is better able to accommodate these concerns.[111]

> Requiring serious grievances as a condition for legitimate secession creates a significant hurdle that reflects the gravity of state-breaking in our world and the fact that secession often does perpetuate and sometimes exacerbate the ethnic conflicts that give rise to it.[112]

Buchanan's argument here is rather vague, but he seems to be saying that: (a) history has demonstrated that secession will often produce substantial harm, and we should attempt to minimise this harm because of its inherently deleterious affect upon human well-being; (b) the greater the number of secessions the greater degree of harm likely to be produced; therefore (c) because his theory will justify a lesser number of secessions than other theories, it will both qualitatively and quantitatively produce less harm and is therefore a superior theory.

However, just because a theory justifies fewer *instances* of secession than another, rival theory, it does not follow from this that it will therefore produce less aggregate

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[108] Buchanan, 'Theories of Secession', p.48.
[109] Buchanan, 'Theories of Secession', pp.44-45.
[110] Buchanan, 'Theories of Secession', p.45.
[111] Buchanan, 'Theories of Secession', pp.44-45.
[112] Buchanan, 'Theories of Secession', p.45.

harm. Indeed, where a group is the victim of the sorts of serious injustices envisaged by Buchanan, then relations between that group and the inhabitants of the rest of the State are more likely to be characterised by the mistrust and enmity[113] that often leads to violence and other associated social ills. This is not to say that groups which are the victims of State-perpetrated injustice should not have a right to secede; even where a group's secession *does* produce a considerable degree of harm this may still be less than that which would otherwise be produced by maintaining the political union.[114] However, if our goal is simply to maximise harm prevention then we should pay attention, not only to the *number* of instances of secession which a theory would justify, but also the *types* of situation(s) in which it would justify secession.

Fifth, and finally, if Buchanan is correct to suggest that secession, or the threat of secession, necessarily has a negative effect upon levels of popular political participation then, because under a RRO theory secession would still be a justified action for some groups, the adoption of a RRO theory would still produce some damage to democracy and for this reason would be a sub-optimal course of action. If Buchanan's analysis is correct, then the only *truly* satisfactory theory of secession can be that under which there is *no* right to secede.

E. The Right to Secede as a Minority Veto

The second part of Buchanan's second argument in favour of the claim that States have a morally legitimate interest in preserving their territorial integrity is premised upon the claim that where exit from a State is too easy then "...if a minority could escape the authority of laws whose enactment it did not support by unilaterally redrawing political boundaries, it would have little incentive to submit to the

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[113] Particularly where this condition of injustice has existed for some time.

[114] For an example of the opposite scenario see Rickard who claims that a possible argument for resisting secession not considered by Buchanan is based upon the need to prevent foreseeable war or oppression in the new political community – i.e. the only way for a group to prevent full scale civil war between competing factions within that group is to maintain their subjection to the greater coercive power of the original State (e.g. the former Yugoslavia). In other words, even if the parent State discriminates against a sub-group this may be preferable to the greater evil of civil war. See Maurice Rickard, 'Buchanan, Allen, Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec', *Australasian Journal of Philosophy*, Vol.71, No.4, 1993, p.503.

majority's will, or to reason with the majority to change its mind."[115] Moreover, claims Buchanan, "...in order to subvert democratic processes it is not even necessary that a group actually exit when the majority decision goes against it. All that may be needed is to issue a *credible threat* of exit, which can serve as a *de facto* minority veto."[116]

The same argument appears in a substantially more developed form in an article by the legal scholar Cass Sunstein.[117] Arguing against a constitutional right to secede,[118] Sunstein claims that allowing minority groups a right to secede will encourage *strategic behaviour* on the part of those groups, thus making the exit of a sub-unit from the nation a relevant factor in every important decision:[119]

> A constitutional system that recognizes and is prepared to respect the right to secede will find its very existence at issue in every case in which a subunit's interests are seriously at stake. In practice, that threat could act as a prohibition [i.e. a veto] on any national decision adverse to the subunit's interests.[120]

Thus, Sunstein believes that the (constitutional) recognition of a right to secede would give groups – particularly those groups that possess resources which are indispensable to the parent State[121] – a disproportionate amount of political influence. Consequently these groups could veto policies which are contrary to their own interests but which, on balance, might be justified. For example:

> A tobacco growing subunit equipped with the right to secede might be able to veto a decision to raise taxes on (say) cigarettes even if that decision would further the nation's long-term interest.

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[115] Buchanan, 'Theories of Secession', p.48.

[116] Buchanan, 'Theories of Secession', p.48 [emphasis added].

[117] Cass R. Sunstein, 'Constitutionalism and Secession', *University of Chicago Law Review*, Vol.58, 1991.

[118] Sunstein acknowledges that on occasion a group's secession may be fully justified as a matter of *political morality*, but is concerned to demonstrate that the existence of these moral claims "...provides insufficient reason for constitutional recognition of the right to secede." See Sunstein (1991), p.670 and pp.634-35.

[119] Sunstein (1991), p.648.

[120] Sunstein (1991), p.649.

[121] Sunstein (1991), p.650.

> Similar considerations apply to the decision to enter into war, to enact environmental regulation or to increase or decrease aid to agriculture.[122]

We should note, however, that both of the above claims require the option to secede to be both *available* (i.e. practically possible) and *attractive* (i.e. in the group's long term interests). In many cases secession will *not* be an available option as, whether for economic, political or social/demographic reasons, a group may simply not be capable of forming a viable, independent State (or, for that matter, joining another pre-existing, independent State). Moreover, even if secession *is* an available option a group may nonetheless decide to remain within its parent State if doing so maximises the group's interests. Because of the severe costs it may impose upon a group, secession may be an available yet unattractive option. Where secession is unavailable or unattractive a group will have no choice but to attempt to further its interests within the established political processes of its parent State, and consequently any threat by the group to secede will not be credible and the objection simply becomes irrelevant:

> ...if the existence of the nation confers mutual benefits – an assumed precondition for its continuation – then subunits will rarely threaten to secede even if constitutionally authorized to do so, and the threat will rarely be credible even if made. The costs of secession will usually be at least as large for the subunit as for the nation. On this view, recognition of a right to secede would never or rarely have the adverse effects claimed for it. A well functioning nation simply will not face serious secession threats; subunits will invoke the right only in the most extraordinary circumstances.[123]

Sunstein, however, remains sceptical about such counter-arguments, claiming that not only in some circumstances will secession further the (economic) interests of the seceding region but, even where it will not, inflamed sentiments and emotions may override technocratic rationality leading a group to secede despite the fact that doing so is against its long-term interests:[124]

> The most that one can do here is to point to the often large emotional attachments to subunits, the possibility of financial gains from strategic behaviour, the familiar frailties of human nature,

[122] Sunstein (1991), p.649.
[123] Sunstein (1991), p.652.
[124] Sunstein (1991), pp.653-54.

> the rational and irrational factors that can make subunits press secession claims, and the potentially debilitating effects of such claims on subunit and national processes of self-government.[125]

The claim, then, is that certain emotional, even atavistic, factors – which may themselves be cynically manipulated by political elites – may on occasion lead the inhabitants of a region to demand a right to secede, despite the fact that secession would not be in their overall best interests. Thus, the fact that a group's best interests would be served by remaining in political union with its parent State does not mean that any threat by that group is not credible and, ultimately, would not be acted upon.[126]

One response to this line of argument has simply been to claim that most rights can be abused, and the solution to such abuse is not to refuse to recognise rights but, rather, to specify the conditions of their proper exercise.[127] Another response[128] might simply be for the parent State to call the group's bluff and let them go. Indeed, where a recalcitrant minority is continuously acting-up and using the threat of secession in an attempt to extract all sorts of unfair advantages, such behaviour might be effectively discouraged by a threat from a majority *to secede from them.*

The most popular solution to the problem of so-called 'vanity' secessions has, however, been the erection of certain procedural barriers, or hurdles, which a group must first overcome before it can exercise its right of secession. Norman, for example, suggests a series of referenda over a specified time period of perhaps two or three years, each of which must be won by the secessionists if they are to possess a right of secession. This 'cooling off period' between referenda would, claims Norman, allow for more rational, principled debate on the issue – particularly in cases where, for example, a group demands the right to secede due to temporary outrage over a political

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[125] Sunstein (1991), p.654.

[126] For a rejection of these claims see Beran (1984), p.30.

[127] Michael Freeman, 'The Priority of Function Over Structure: A New Approach to Secession', *Theories of Secession*, Percy B. Lehning (ed.) (New York: Routledge, 1998), p.23.

[128] Which to my knowledge has yet to be seriously considered by contributors to the secession debate.

event.[129] Moreover, it would also force a significant delay between issuing a threat of secession and that threat being acted upon, thus undermining at least some of the strategic advantage which a sub-group may derive by issuing a threat to secede.

One can imagine where, if a sub-group threatened to initiate secessionist procedures *immediately* unless it got its own way, then this might cause the parent State to baulk and give in to the group's demands. However, if the sub-group had to wait a significant period of time between issuing a threat to secede and acting upon that threat, then the threat loses much of its 'bite' and the State will be less likely to take the threat seriously. States are typically more concerned with policy matters that demand their immediate attention and which pay dividends immediately or in the short-term, rather than being preoccupied with what *might* happen two or three years down the track. A delayed threat of secession, while still having *some* influence over political decision-making, is unlikely to have the impact of an immediate threat to secede. The threat to walk out in two years time is substantially weaker than a threat to walk out tomorrow, next week or even next month.

More importantly, however, note that Buchanan, eager to avoid the charge that the risk of strategic bargaining provides a justification for ruling out a right of secession *altogether*, adopts a similar strategy to Norman. In a 1993 paper that precedes his 1997 defence of RRO theories against PR theories on the grounds of strategic bargaining Buchanan writes:

> Consideration of [the risk that a group's threat to secede might function as a minority veto over the majority's decisions]...might lead one to conclude that the only adequate way to protect democracy is to refuse to acknowledge a right to secede. However, as we have seen, there can be compelling justifications for secession under certain conditions. Accordingly, a more appropriate response than denying the right to secede is to devise constitutional mechanisms or processes of international law that give some weight to legitimate interests in secession and to the equally legitimate interest in preserving the integrity of majority rule (and in political stability). The most obvious way to...minimize the risk of strategic bargaining with the threat of secession [is] by erecting inconvenient but surmountable procedural hurdles to secession.[130]

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[129] Norman, p.54.

[130] A. Buchanan, 'Secession and Nationalism' in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Oxford: Basil Blackwell, 1993), pp.594-95. Also see Daniel

As an example of such procedural hurdles Buchanan considers the requirement that more than a simple majority of voters support secession and the levying special exit costs – a 'secession tax.' However, what constitutes a so-called 'legitimate interest in', or 'compelling reason for', secession is a matter of opinion. Whereas Buchanan would claim that there are only three such interests or reasons (i.e. a lethal threat, discriminatory re-distribution and rectificatory justice) ascriptive and associative PR theorists would claim that being a nation in a multi-national State, or a majority of a group's members favouring secession, also count as legitimate reasons for secession.

The question is, if, as Buchanan suggests, these procedural hurdles are sufficient to effectively deal with the problem of strategic bargaining as far as RRO theories are concerned, then why aren't they equally capable of doing the same for PR theories? To point out that a RRO theory may justify more instances of secession than a PR theory does not explain why, if procedural hurdles are sufficient to overcome the problem of strategic bargaining for RRO, they cannot perform the same function with respect to PR theories.

Finally, suppose Buchanan and Sunstein are correct: PR theories create an opportunity for groups to wield a disproportionate amount of power relative to other groups in a polity, and thus extract certain benefits and advantages which they would otherwise not be able to. It need not follow that this is a sufficient reason to therefore reject PR theories as, not only may the existence of a right to secede be a necessary inducement to persuade sub-units to enter the State in the first place,[131] but, as was noted above, it may serve as an effective check against the majority disregarding the interests and wishes of minority groups and treating those groups unjustly.[132] Thus, any injustices *produced* by the adoption of a PR theory of secession may conceivably be more than compensated for by the injustices which such a theory *prevents*.[133]

Philpott, 'Self-Determination in Practice' in *National Self-Determination and Secession*, ed. Margaret Moore (Oxford: Oxford University Press, 1998), pp.96-7.

[131] See Sunstein (1991), p.653; and Philpott (1998), p.96

[132] Beran, (1998), p.54.

[133] As Boykin points out: "The fact that a majority wishes to impose its position on a recalcitrant minority does not morally privilege the majority. Here again, the right to secede appears as a way to limit public power, and since anyone could expect to be in the minority at some point, anyone could reasonably reject restrictions on the right to secede which impose high costs on those wishing to escape a majority hostile to their interests." Boykin, p.75.

3.4 THE AVOIDANCE OF PERVERSE INCENTIVES

A. Introduction

Buchanan claims that the incorporation of PR theories into international law would "...encourage States to act in ways that would prevent groups from becoming claimants to the right to secede, and this might lead to the perpetration of injustices."[134] This is in contrast with RRO theories which Buchanan believes would create only a laudable incentive for States not to violate their citizens' primary right not to be treated unjustly. Buchanan explains:

> States [under a Remedial Right Only Theory] ...would have an incentive to improve their records concerning the relevant injustices in order to reap the protection from dismemberment that they would enjoy as legitimate, rights-respecting states... In contrast, a regime of international law that recognized a right to secede in the absence of any injustices would encourage even just states to act in ways that would prevent groups from becoming claimants to the right to secede, and this might lead to the perpetration of injustices. For example, according to Wellman's version of Primary Right Theory, any group that becomes capable of having a functioning State of its own in the territory it occupies is a potential subject of the right to secede. Clearly any state that seeks to avoid its own dissolution would have an incentive to implement policies designed to prevent groups from becoming prosperous enough and politically well-organized enough to satisfy this condition... In short, Wellman's version of Primary Right Theory gives the state incentives for fostering economic and political dependency.[135]

B. The Importance of Avoiding Perverse Incentives

On one hand, the issue of perverse incentives appears to be an important one, as clearly we do not want to encourage the performance of actions which would result in a morally sub-optimal state of affairs. On the other hand, however, in many respects perverse incentives appear to be somewhat unavoidable whenever the interests of two parties conflict and one party is given a right against the other. Moreover, it is far from

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[134] Buchanan, 'Theories of Secession', p.52.

[135] Buchanan, 'Theories of Secession', p.52. Note also, that Buchanan appears to have overlooked the possibility that by encouraging this dependency the State may incur certain costs (e.g. economic stagnation, civil unrest, international disapprobation etc). Moreover, these costs may, on occasion, outweigh those that would be produced as a result of the sub-group's secession, in which case the rational course of action based upon a simple analysis of the benefits/costs to the parent State may actually direct that State to allow the sub-group to secede.

obvious why the existence of such an incentive should *necessarily* provide a conclusive reason against granting the right in question.

For example, an important tool for keeping governments accountable in liberal-democratic societies is the right of citizens to obtain information from the government about its activities and policies. The right is not an unlimited right. Some information will, quite correctly, be deemed too sensitive to publicise and consequently remain secret.[136] In most cases, however, unless there is an overriding reason to the contrary, citizens have a right to access information in the government's possession. Clearly, however, the government's interests will not always be served by the exercise of such a right, e.g. the government may be embarrassed by oversights and blunders which it has made, thus damaging its reputation and chances of re-election.[137] Hence, to the extent that the release of certain information would not be in its best interests, the government has a *perverse incentive* to conceal that information by attempting to thwart the public's exercise of its right to access it.[138]

The methods employed by governments in attempting to hide such information may range from the relatively trivial[139] to the more serious and morally censurable.[140] Most people, however, would not be inclined to therefore argue that citizens do not, and should not, have a right to access government information – particularly information which may embarrass the government. Indeed, in many respects it would seem that the whole point of the right is to publicise *precisely* that information which the government would prefer to conceal and which, therefore, produces an incentive for it to act immorally.[141]

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[136] e.g. for reasons of national security the government may refuse to release details about the specifications of its latest weaponry.

[137] Indeed, as we shall soon see, it is precisely for the reason that the government's best interests may be served by not releasing certain information, that citizens are taken to have a right of access to it.

[138] Despite the fact that information and its release fails to fulfil the criteria which would normally justify the government restricting access to it.

[139] e.g. simply lying and denying that any such information exists.

[140] e.g. 'leaning' on people to destroy the information or doing nasty things to people who have inadvertently come into possession of such information – the stuff of which Hollywood movies are made.

[141] The point should also be made that because an incentive operates by offering a reward for the performance of a particular course of action, the incentive simply makes the performance of that action more attractive in comparison to other, alternative available actions – it does *not* make that action necessary. One may, for a variety of reasons, fail to do that which one has an incentive to do.

Similarly, Buchanan's theory of secession is itself not immune from claims of perverse incentives. For example, Buchanan claims that while a group possesses a right to secede if, and only if, it satisfies one or more of the three arguments identified by him above,[142] it must also secure 'just terms of secession.'[143] Buchanan's just terms of secession are a collection of conditions which govern the *post*-secession actions of the new State, proscribing certain actions and making other actions mandatory, e.g. the new State must: (a) meet minimal standards of justice especially with respect to the human rights of its citizens;[144] (b) arrive at a fair division of the national debt and other national assets/obligations; and (c) arrange for the continuation, renegotiation or termination of existing treaty obligations.[145]

It is fairly obvious what Buchanan is after here. Indeed, the notion that considerations of justice and fairness create moral obligations for a group to act, or refrain from acting, in a certain way both during and after secession is an important one upon which most theorists tend to agree. For example, both Nielsen and Gauthier point out that if Quebec were to secede from Canada, then considerations of distributive justice create an obligation for Quebec to shoulder its fair share of the national debt[146] and respect the rights of the Anglophone minority within its borders.[147] Note, however, that Buchanan makes the possession of a right to secede contingent upon the fulfilment of these obligations.[148] Moreover, because these conditions refer to a group's *post* secession actions[149] this creates a problem for Buchanan. To allow a group to secede only to then turn around and say that, retrospectively, that group's secession was

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[142] i.e. rectificatory justice, discriminatory redistribution and the need for self-preservation.

[143] Buchanan, 'Theories of Secession', p.37.

[144] Buchanan denies that groups such the Nazis or Khmer Rouge should be allowed to secede. See Buchanan (1991), p.56 and 61. Also see Margalit and Raz, p.459.

[145] Buchanan, 'Theories of Secession', p.37.

[146] Note that these same considerations may also require that Quebec be allowed to take possession of certain federal assets. See Kai Nielsen, 'Secession: The Case of Quebec', *Journal of Applied Philosophy*, Vol.10, No.1, 1993, p.36; and Gauthier, p.366

[147] Of particular concern is the welfare of the Anglophone minority in Quebec as well as certain ethnic groups of indigenous peoples. See for example Nielsen (1993), pp36ff; and Gauthier, p.370.

[148] i.e. if these moral obligations remain unfulfilled then there is no right to secede. See for example Buchanan, 'Theories of Secession', p.37.

[149] i.e. the group's ability to possess a right to secede is dependent upon its ability to fulfil certain conditions which it can only fulfil *after* it has exercised this same right.

unjustified because of what it did (or failed to do) *after* having seceded, is the political equivalent of shutting the stable door after the horse has bolted.[150]

Buchanan's solution to this problem is to talk in terms of the secessionist group offering a 'credible guarantee' (i.e. a promise) that *after* having seceded, it *will* abide by the requirements of the just terms of secession.[151] Clearly Buchanan believes that requiring groups to divulge their post-secession intentions is an effective means of eliminating (at least some of) those groups who will proceed to behave immorally after seceding as, if it were not, then what possible reason could there be for such a requirement in the first place? This, however, does not mean that in order to possess a right to secede a group must not act in an unjust manner after having seceded. Rather, it simply means that *prior* to its secession a group must avoid *suspicion* that it *would* act in such a manner. Therefore, for those groups that *do* intend to act unjustly after having seceded, Buchanan's solution creates a perverse incentive for them to lie about their post secession intentions (e.g. a group which plans to establish a fundamentalist State may lie about its intention to respect human rights in order to remove any potential objections to its secession).

To this Buchanan may respond that the elimination or minimisation of post-secession injustices (some of which may be quite severe) takes moral precedence over reducing the number of incidences of lie telling. Given that requiring groups to disclose their post-secession intentions is an instrumentally effective means of reducing the perpetration of such injustices, it should be preserved as the lesser of the two evils. Moreover, in order to demonstrate the relative superiority of RRO theories with respect to the criterion of the avoidance of perverse incentives, it is not necessary to demonstrate that RRO theories produce *no* incentives for immoral behaviour. Rather, it

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[150] Of course counter-factually we may be able to determine with a considerable degree of accuracy what the post-secession actions of a group are likely to be, before that group actually secedes. For example, in respect to the two cases mentioned by Buchanan of the Nazis and the Khmer Rouge, there exists clear historical antecedents of genocide which indicate that it would be most unwise to grant these groups a right to secede. In other cases, however, where no such clear indicators exist, the epistemic difficulty in distinguishing those groups which are likely to behave in an unjust manner after secession from those which are not, means that we may not always get things right, and hence may allow a group to secede only to then witness that group commit a grave injustice.

[151] i.e. a group must disclose what its post-secession intentions are, and where these intentions contradict certain principles of justice then we should conclude that that group does not possess a right to secede. Buchanan, 'Theories of Secession', p.37.

is only necessary to show that quantitatively and/or qualitatively they produce *fewer* perverse incentives than do other, alternative theories. Thus, while the general adoption of RRO theories may, indeed, produce numerous incentives for agents to act immorally, these pale into insignificance when compared to the perverse incentives produced by a PR theory such as Wellman's.

However, while securing a morally optimal state of affairs is clearly an important concern, it is far from obvious that giving in to the threat of immoral acts is necessarily an instrumentally effective means of creating such an environment. A theory of moral rights – including the right to secede – should apportion rights on the basis of moral principles to those who are morally entitled to possess them. It should *not* seek to avoid conflict by allowing unjust antagonists to mistreat others. The purpose of moral rights is not to appease the morally destitute or reward the performance, or threat of the performance, of morally unjust actions. Yet, whenever we allow threats, or the possibility, of immoral acts to tip the moral scales in such a manner by declining to grant one party a right[152] against another party, simply because doing so *might* encourage the latter to behave immorally, then that is exactly what we are doing.

Consider, for example, a situation where the weight of moral reasoning supports giving G a right against S which may fail to promote, and may even damage, S's interests. To conclude that we should not grant G such a right because doing so might encourage S to behave immorally, in a way that s/he would not if G did not possess the right in question, is to reward the performance, or threat of the performance, of these immoral acts and thus perpetuate a morally sub-optimal state of affairs. Buchanan's criterion of the avoidance of perverse incentives replaces the *possible* injustice of avoidable economic and political dependency amongst a State's sub-regions, with the *certain* injustice of holding a sub-region captive against its will by denying it a moral right of secession which it would otherwise possess. Ironically, this itself creates a perverse incentive for States to behave, and threaten to behave, in an immoral manner safe in the knowledge that doing so remains an effective means of furthering their own interests by preventing others being granted rights to which, *ceteris paribus*, they are

[152] A right which, *ceteris paribus*, that party is morally justified in possessing.

morally entitled. There is nothing morally legitimate about a deal done to appease the (would-be) perpetrators of immoral acts.

3.5 MORAL AND LEGAL CONSISTENCY

A. Introduction

Finally, with respect to the criterion of moral and legal consistency Buchanan claims that a theory of secession should "...build upon, or at least not squarely contradict, the more *morally acceptable* principles of existing international law, *when these principles are interpreted in a morally progressive way.*"[153] Moreover, claims Buchanan, the principle of territorial integrity "...is generally regarded as the single most fundamental principle of international law."[154] Buchanan objects to PR theories because by granting a right to secede to nations and democratically self-defined groups they "...represent a direct and profound threat to the territorial integrity of states – even just states."[155] Conversely, because RRO theories advance a much more restricted right to secede, they are *consistent with* rather than 'in direct opposition to'[156] the principle of the territorial integrity of existing States, and hence with existing international law.[157]

B. The Moral Assessment of International Law

To begin with, we should note that Buchanan's notion of 'consistency with the principle of territorial integrity' is simply a comparative term that indicates a theory's degree of permissiveness.[158] The more restrictive a theory of secession is the fewer instances of secession it will justify and, therefore, the more 'consistent' it will be with the principle of the territorial integrity of existing States. Moreover, because both RRO theories *and* PR theories may contain restrictions upon which groups may secede (i.e. both theories may coherently maintain that the right to secede is *not* an absolute right),

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153 Buchanan, 'Theories of Secession', p.42 [emphasis added].

154 Buchanan, 'Theories of Secession', p.46.

155 Buchanan, 'Theories of Secession', p.45.

156 Buchanan, 'Theories of Secession', p.46.

157 See Buchanan, 'Theories of Secession', p.46 and p.51.

158 i.e. how much emphasis the theory places upon the right of States to maintain their territorial integrity relative to the right of groups to secede.

both may be 'consistent' with the principle of territorial integrity. Therefore, what Buchanan should *really* say is that, because a RRO theory may place *greater* emphasis upon the right of States to maintain their territorial integrity than does a PR theory, it may be *more* consistent with the principle of the territorial integrity of existing States than is a PR theory. The important point for Buchanan, then, is that his theory is considerably *less* permissive – or, alternatively, *more* restrictive – than those of other theorists such as Wellman.

There are two primary objections to Buchanan's claim that RRO theories are superior to PR theories because they are more consistent with the principle of the territorial integrity of existing States. The first objection, and Buchanan's response to it, have both been dealt with above (i.e. because international law is made and enforced by States who have no interest in sanctioning their own dismemberment, the fact that governments will not enact secession procedures, does not demonstrate that such procedures are unfair or unjust). There is no need to go over these arguments again here.

The second objection claims that if Buchanan is correct – and the greater the degree of emphasis a theory places upon the right of States to maintain their existing political boundaries[159] the more satisfactory that theory is – then it would seem that the only *truly* satisfactory theory of secession is one based upon an absolute notion of territorial integrity where there is *no* right for groups to secede. Not only would this make the search for a normative theory of secession a self-defeating task,[160] but because Buchanan's theory maintains that there *is* a right to secede – albeit a highly qualified one – then it too must ultimately be judged to be unsatisfactory. Moreover, if consistency with the principles of existing international law is a valid criterion for assessing the satisfactoriness of a normative theory of secession then it is unclear *why* we need a theory of secession in the first place. If the superior theory is that which most closely mirrors existing international law then why not simply rely on international law for the normative assessment of demands to secede?

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[159] And, therefore, the lesser the emphasis they place upon the right of groups to secede.

[160] i.e. why should we bother wasting our time trying to formulate a theory which tells us which groups have a right to secede, when the only truly satisfactory theory can be one which denies that there is any such right in the first place.

At this point, however, Buchanan introduces a distinction between an *absolutist* and a *morally progressive* interpretation of the principle of territorial integrity. As its title suggests, the absolutist interpretation of the principle of the territorial integrity of existing States recognises no right to secede – remedial or otherwise. Conversely, the morally progressive interpretation of the principle applies only to so-called 'legitimate' States, and not all existing States are legitimate.[161] Bearing in mind that whether or not a State is legitimate in the sense that it qualifies for the right to maintain its territorial integrity in the face of a demand by a sub-region to secede is, of course, exactly what a theory of secession is supposed to tell us, making legitimacy a necessary pre-condition for the possession of a moral right to secede simply begs the question of under what conditions a State becomes il/legitimate. In recognition of this difficulty Buchanan responds:

> ...recent international law provides some guidance: States are *not* legitimate if they (1) threaten the lives of significant portions of their populations by a policy of ethnic or religious persecution, or if they (2) exhibit institutional racism that deprives a substantial proportion of the population of basic economic and political rights.[162]

As an example of the former scenario Buchanan cites Iraq's mis-treatment of its Kurdish minority, whereas apartheid South Africa provides an example of the latter scenario. Buchanan's reliance on existing international law for the criteria of a State's il/legitimacy in this context, however, creates some ambiguity over exactly *what* is the source of a State's il/legitimacy. For example, was apartheid South Africa illegitimate *because* it employed racist policies against its black majority, or because in doing so it contravened international covenants on racial equality? Similarly, is Iraq illegitimate because it has mistreated its Kurdish minority, or, rather, because its mistreatment of the Kurds has contravened international law on human rights? In other words, is the breaking of international law the source of the illegitimacy or, rather, the immoral policies which both States have pursued (and which, it just so happens, are contrary to international law).

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[161] See Buchanan, 'Theories of Secession', p.50.

[162] Buchanan, 'Theories of Secession', p.50.

Buchanan seems to come down heavily on the side of the latter claim. Thus, the important thing for Buchanan is *not* that a RRO is more consistent with existing international law than a PR theory. Rather, Buchanan rejects *legal positivism*[163] by claiming that a RRO theory is superior to a PR theory because by more closely mirroring international law it thereby instantiates to a greater degree certain antecedent moral principles. Buchanan explains:

> ...it is important to emphasize that the relevance of actual international law is conditional upon the moral legitimacy of the interests that the law, or in this case, changes in the law, serves. The key point is that the shift in international law away from the absolutist interpretation of the principle of territorial integrity toward the progressive interpretation serves morally legitimate interests and reflects a superior normative stance. So it is not mere conformity to existing law, but consonance with morally progressive developments in law, which speaks here in favor of Remedial Right Only Theories.[164]

In other words international law is itself morally assessable by reference to certain *a priori* moral principles that exist independent of, and prior to, international law.[165] The relative superiority of RRO theories therefore stems, *not* from the fact that they mirror existing international law to a greater extent than do rival PR theories but, rather, that *by* more closely mirroring existing international law they thereby instantiate certain antecedent moral principles to a greater degree than do PR theories. The issue, therefore, is not simply the degree to which a theory reflects existing international law but, rather, the degree to which it instantiates the moral principles by which international law is morally assessed. This, however, simply shifts the focus of the disagreement to the question of what are the normative principles by which international is morally assessable. To claim, as Buchanan does, that by moving from an absolutist interpretation of territorial integrity to a freer, less-restrictive interpretation international law is thereby adopting a 'superior normative stance' is simply to beg the question of how we should morally assess international law.

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[163] i.e. the view that the law can be defined without any reference to its content and that the existence of law is one thing – its merit or demerit another. See *A Dictionary of Philosophy* (London: Macmillan, 1979).

[164] Buchanan, 'Theories of Secession', p.51.

[165] i.e. a rejection of legal positivism.

The question is whether or not a RRO theory is morally superior to a PR theory. Buchanan answers: 'Yes, because a RRO theory is more consistent with existing international law's treatment of the right of existing States to maintain their territorial integrity.' The question then becomes: 'Why is consistency with international law's treatment of a State's right to maintain its territorial integrity necessarily a criterion of moral satisfactoriness?' As we have seen, Buchanan's response is to claim that by moving from an absolutist interpretation of the principle of territorial integrity to a slightly less restrictive definition that allows for State-breaking in certain circumstances, international law has adopted a morally superior stance. This, however, simply begs the question of *why* the existing, highly restrictive, interpretation of the principle of territorial integrity is necessarily morally superior, not only to the absolutist interpretation that preceded it, but also to an even less restrictive interpretation such as that favoured by PR theorists.

Thus, Buchanan simply returns us to the original question of whether or not a RRO theory is morally superior to a PR theory, while bringing us no closer to identifying a satisfactory answer to it. A PR theorist such as Wellman may, for example, *agree* with Buchanan that by adopting a less-restrictive interpretation of the principle of the territorial integrity of existing States (and thus allowing for the possibility that secession may, in certain circumstances, be justified) international law has, indeed, adopted a superior normative stance. However, Wellman would also claim that international law should go further than this and recognise that a State's territorial integrity may be legitimately infringed, not only where that State is engaging in practices of genocide and racial discrimination, but also where a regionally concentrated majority has expressed a desire to secede. Moreover, there is nothing in Buchanan's analysis in its present form which establishes that his interpretation of a State's right to maintain its territorial integrity is morally superior to that of Wellman or, for that matter, any other rival theorist.

3.6 A CRITICAL ASSESSMENT OF JUST CAUSE THEORIES

A. Buchanan's RRO Theory as One Amongst Many

Thus far the chapter has focussed upon the claim that RRO theories are superior to PR theories and the reasons Buchanan puts forward to support this claim. In this, the final section of this chapter, the aim is to clarify some issues about: (a) RRO theories in general; (b) Buchanan's distinction between RRO and PR theories; and (c) how these issues relate to Buchanan's claim that RRO theories are superior to other, rival types of theory.

Above it was pointed out that simply requiring groups to be the victim of an injustice in order to possess a right of secession begs the question of exactly *what* injustices are capable of generating such a right.[166] Moreover, depending upon *what* injustice(s) a RRO theory conceives of as sufficient to generate a right to secede, a RRO theory may, *or may not*, justify relatively few instances of secession. In other words, there is nothing inherent to the requirement that a group be a victim of injustice that is necessarily supportive of the State's right to maintain its territorial integrity. Therefore while the injustices specified by Buchanan *in his version* of a RRO theory would apply to relatively few groups over time – and hence justify relatively few instances of secession – this need not be true of *all* RRO theories. Indeed, Buchanan recognises this fact by noting that "[d]epending upon which injustices they recognize as grievances sufficient to justify secession, Remedial Right Theories may be more liberal or more restrictive."[167]

B. Three Issues With RRO Theories

That RRO theories may – depending upon what injustices they consider to be sufficient to ground a right of secession – be relatively more or less supportive of a State's right to maintain its territorial integrity, raises three inter-related issues. The

[166] Of course, even if there is a agreement upon the injustice(s), or *types* of injustice(s), in question, there may remain disagreement over whether or not a given group actually *is* the victim of such an injustice and, therefore, whether that group possesses a right to secede. Thus, we need to distinguish between *formulating* the conditions which must be met if an act of secession is to be justified, and *establishing* whether or not those conditions are in fact met in some particular example.

[167] Buchanan, 'Theories of Secession', pp.36-37.

first issue – in many respects merely a clarification – is simply that the three criteria which Buchanan cites in support of his claim that RRO theories are superior to PR theories, even if correct, are really applicable only to a sub-class of highly restrictive RRO theories such as his own and others similar to it.[168]

The second issue concerns what it is about Buchanan's theory that, in his opinion, makes it superior to other theories which he categorises as PR theories. Buchanan claims that because his theory is relatively less permissive than so-called PR theories it out scores them by reference to the above three criteria by which a secession theory's satisfactoriness may be assessed. Thus, because RRO theories justify fewer instances of secession than PR theories Buchanan believes they: (a) are more likely to be adopted by States into international law; (b) create fewer perverse incentives for States to behave immorally; and (c) are more consistent with the principle of the territorial integrity of existing States. Hence, the 'bottom line' for Buchanan – what in his opinion makes his theory better than other, rival theories – is *not* that his is a RRO theory that grants only a *remedial* right of secession and that these other theories are PR theories that grant a *general* right of secession in the absence of any injustice. Rather, what matters is that Buchanan's theory would justify relatively fewer instances of secession over time.

Indeed, in many respects the distinction between PR and RRO theories appears increasingly redundant. One could, for example, imagine a RRO theory considerably more permissive than Buchanan's that considered relatively trivial injustices sufficient to justify a right of secession. However, despite qualifying as a RRO theory, Buchanan would presumably reject it for exactly the same reasons that lead him to reject PR theories such as Wellman's. Similarly, one could also imagine a highly restrictive Nationalist or LD theory that, through an extremely parsimonious definition of nationhood and the utilisation of onerous side constraints, was *at least* as restrictive as Buchanan's RRO theory. Such a theory would, despite being a PR rather than a RRO theory, also satisfy these three criteria to the same extent as Buchanan's theory.

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[168] A point which, in all fairness to Buchanan, he does not appear to be completely unaware of. See Buchanan, Theories of Secession', p.35 and p.37.

The third, more serious, issue concerns whether or not Buchanan's distinction between PR and RRO theories is sustainable. It will be remembered that in order to qualify as a RRO theory all that is necessary is that the theory grant a right of secession only to those groups which have been the victim of injustice, and different RRO theories may take different injustices as sufficient grounds for secession. Buchanan repeatedly attempts to distinguish RRO theories from PR theories by claiming that because PR theories do not require a group to be the victim of an injustice in order to possess a right to secede they, unlike RRO theories, are therefore committed to the view that a group may possess a right to secede from a 'perfectly just' State.[169] Buchanan, explains:

> According to Primary Right Theories, a group can have a (general) right to secede even if it has suffered no injustices, *and hence it may have a (general) right to secede from a perfectly just state.* Ascriptive characteristics, such as being a people or a nation, do not imply that the groups in question have suffered injustices. Similarly, according to Associative Group Theories, what confers the right to secede on a group is the voluntary choice of members of the group to form an independent state; no grievances are necessary.[170]

The important issue as far as a normative theory of secession is concerned, is when does a State commit the injustice of not allowing a group to secede? So-called RRO theorists respond by saying: 'When that group is the victim of an (extreme) injustice such as human rights abuses.' In contrast, so-called PR theorists respond: 'When a majority of that group have expressed a desire to do so or when that group is a nation.' Moreover, to say that a group possesses a moral right to secede is also to say that that group's continued political union with its parent State, and hence any attempts by the parent State or any other party to maintain that union, are morally unjust. Thus, as long as the group remains a constituent component of its parent State a condition of injustice obtains – i.e. the State of which the group is a part is an unjust State – and the only way in which this condition of injustice may be remedied is by the group's secession.

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[169] i.e. a State which has committed no injustices.

[170] Buchanan, 'Theories of Secession', p.40 [emphasis added].

Of course, to the extent that different RRO theories take different injustices as sufficient to justify a right of secession, they will disagree over whether or not a given group possess a right to secede and, thus, whether or not the State of which that group is a constituent component is unjust. Moreover, because PR and RRO theories disagree over what conditions are sufficient to ground a right of secession they will therefore also disagree when a State becomes unjust by refusing to recognise a sub-region's demand to secede. This, however, is not to say that the two types of theory may not produce results that converge. For example, a State may contain no groups who are the victim of an injustice, who harbour a desire to secede and/or who constitute a nation (however that term is defined). Alternatively, a State may contain a group which is both the victim of serious human rights abuses and which for that, or some other reason, expresses a desire to secede and/or qualifies as a nation.

In both examples the necessary conditions for possession, or lack of possession, of a right to secede under all three theories have been fulfilled and thus all three theories may agree that the State in question is either just or unjust. However, they would do so for different reasons. For example, in the second case, whereas Buchanan would claim that the group possesses a right of secession because it is a victim of serious human rights abuses, Wellman or Beran would claim that the group should be allowed to secede simply because a majority of its members desire to (regardless of why they possess this desire), and Miller because they are a nation.[171]

Remembering that simply requiring a group to be the victim of an injustice if it is to possess a right to secede begs the question of exactly what injustices are sufficient to justify such a right, Buchanan's claim that PR theories grant a right of secession from States which are 'perfectly just' begs the question of what constitutes an injustice and when the State is un/just. For both PR and RRO theories any State that refuses to recognise a group's legitimate right to secede is *by definition* unjust. This raises the question of whether: (a) RRO theories are, as Buchanan claims, distinct from PR

[171] That there may be an overlap between these different types of theory in the sense that, on occasion, they may produce the same directive, or lack of directive, for a group to secede is noted by Beran with respect to the Nationalist theory and Liberal-Democratic theories. Thus, while the Liberal-Democratic theory conflicts with the principle that nations should coincide with States, it grants nations a right of secession when the members of a nation are united in a wish for a State of their own. See Beran (1998), p.42.

theories because they require a group to first be the victim of an injustice if it is to possess a right of secession whereas PR theories do not; or (b) the only difference between the two types of theory are the *types* of injustice(s) which each regards as sufficient to justify a right of secession.

For example, an associative PR theorist, such as Wellman or Beran may simply claim that where a group is not permitted to secede after a majority of its members have expressed a desire to do so, then that group is therefore the victim of the injustice of being held as a political captive against its will. Thus, for Wellman and Beran, *ceteris paribus*, any State that refuses to acknowledge a sub-region's right of secession after a majority of that sub-region's members have expressed a desire to secede is unjust. Similarly, an ascriptive PR theorist such as Miller would claim that where a national minority is not permitted to secede and create its own, independent State then it too is a victim of the injustice of being held against its will. Thus, for Miller, *ceteris paribus*, a State which contains a national minority and refuses to allow that minority to secede and create its own independent State is by definition unjust. In contrast, Buchanan denies both these suggestions by claiming that a group possesses a right to secede only if it is the victim of practices of discriminatory re-distribution, faces a lethal threat or has had its territory taken from it. For Buchanan, then, any State that refuses to grant a group that fulfils one or more of these three conditions is unjust.

The disagreement now appears to be one, not over whether or not a group should first have to be a victim of an injustice in order to possess a right to secede but, rather, over exactly *what* constitutes an injustice sufficient to ground a right of secession (and thus render a State unjust for as long as it continues to deny a sub-group the ability to exercise that right). Thus, it seems that what Buchanan should *really* say is that a PR theory may justify acts of secession from States which are perfectly just *according to a RRO theory's conception of a perfectly just State*. However, in anticipation of such an objection Buchanan claims that:

> ...in the statement that Primary Right Theorists recognize a right to secede from perfectly just states the term 'just' must be understood in what might be called the *uncontroversial* or *standard* or *theory neutral* sense. In other words, a perfectly just state here is one that does not violate relatively *uncontroversial* moral rights, including above all human rights, and which does not engage in

> *uncontroversially* discriminatory policies towards minorities. This conception of justice is a neutral or relatively uncontroversial one in this sense: We may assume that it is acknowledged both by Remedial Right Only Theorists and Primary Right Only Theorists – that both types of theorists recognize these sorts of actions as injustices, though they may disagree in other ways as to the scope of justice. In contrast, to understand the term 'just' here in such a fashion that a state is assumed to be *unjust* simply because it contains a minority people or nation...or simply because it contains a majority that seeks to secede but has not been permitted to do so, would be to an employ a conception of the justice [*sic*] that begs the question in this context, because it includes elements that are denied by one of the parties to the debate, namely Remedial Right Only Theorists.[172]

Thus, Buchanan rejects the claim that a State may be unjust simply because it refuses to permit a regionally concentrated majority to secede after that majority has expressed a desire to do so, or because it contains a minority nation, due to the fact that it employs a conception of justice upon which there is not universal agreement. But why should we be concerned about a universally acceptable, theory neutral, conception of justice when the very reason that there is disagreement between Buchanan and theorists such as Wellman and Beran, is precisely because the two sides have divergent conceptions of what constitutes a condition of injustice? Buchanan's response seems to be that one must point to principles above and beyond one's own theory in order to demonstrate why a given action is right or wrong, i.e. one cannot claim that the denial of a group's right to secede is unjust because it is a requirement of justice that that group possesses a right to secede. Hence, when the PR theorist claims that a State is unjust simply because it denies a group the right to secede, this simply begs the question of why a denial of a right to secede in that, or any other, context constitutes an example of an injustice.

Suppose we accept Buchanan's question begging objection, and thus admit that one must provide a reason why a given action is, or is not, just by appealing to some external criterion of justice. Associative PR theorists such as Wellman, Gauthier and Beran do not appeal to what they take to be a self-evident right of secession. Rather, they conceive of a right to secede as a *derivative right* based upon, and justified by reference to, certain maxims such as freedom of association and the rights of democratically self-defined majorities that, in certain specified circumstances, are

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[172] Buchanan, 'Theories of Secession', pp.40-41 [emphasis added].

violated where a right of secession is denied. For associative PR theorists it is not the denial of a right to secede *simpliciter* that is the injustice but, rather, the violation of these underlying moral principles from which the right to secede is derived. Thus, even if Buchanan's objection is correct, it seems questionable whether it is really germane to the case of associative PR theories.

Moreover, the principles from which the associative PR theorist derives a right of secession are principles to which Buchanan is himself also committed. Buchanan does not deny that democracy is a desirable form of government, nor does he question the individual rights of freedom of speech and association which are its concomitants. Indeed, one of the reasons which Buchanan gives for rejecting PR theories is the belief that their adoption would produce outcomes which would be unavoidably hostile to democracy. The difficulty for Buchanan is to demonstrate why democracy provides an answer only to the question 'How should States be governed?' and not the additional question of 'What are the political boundaries of the State?' Why should democratic methodology and the exercise of the right of freedom of association be confined within existing political boundaries and not also used to determine what those boundaries are? Indeed, it is Buchanan who, in claiming that the State's right to territorial integrity in all but the most extreme of circumstances trumps a right of secession,[173] appears to be begging the question by first accepting democratic maxims, but then claiming that they do not provide a justification for secession in a manner asserted by other parties to the debate – i.e. associative PR theorists.

3.7 CONCLUSION

The difficulty for Buchanan is to demonstrate why there should be a weighty presumption in favour of the right of States to maintain their territorial integrity, such that a group is justified in seceding only where it: (a) is the victim of practices of serious discriminatory re-distribution; (b) faces a lethal threat to its existence; or (c) has had its land unjustly taken from it in the past. This is the position favoured by Buchanan and which he terms a RRO theory. Conversely, other, more permissive

[173] And thus claiming that the burden of justification – and an extremely onerous burden of justification

theories of secession which impose a considerably less onerous burden of justification upon would-be secessionists – which Buchanan wants to argue against – are termed PR theories.

Above it was questioned whether in fact this distinction between RRO theories and so-called PR theories is really a coherent or a necessary one. Indeed, there seems good reason to question, not only whether such a distinction is sustainable, but also whether it – or rather the fact that Buchanan's theory is substantially less permissive than these other, competing theories – is really what provides the driving force behind his preference for RRO theories. Additionally, Buchanan's emphasis upon legitimate territorial sovereignty as a necessary pre-condition for possession of a right to secede was also critically evaluated and the claim made that such a requirement is simply a red herring that unnecessarily complicates matters.

Even if, however, we put these various concerns aside, the question remains why we should grant a right of secession only to those groups which fall under one of the three arguments identified by Buchanan. In response Buchanan appeals to the three criteria of minimal realism, the avoidance of perverse incentives and consistency with a morally progressive interpretation of international law. However, upon examination it was found that each of these criteria were incapable of demonstrating that Buchanan's theory was in fact the superior option. The former criterion ignores the fact that States, and the institutions which have evolved around them, have no interest in sanctioning their own dismemberment. Moreover, the reasons given by Buchanan in support of the claim that States have a morally legitimate interest in maintaining their territorial integrity are not only unpersuasive, but also fail to demonstrate why – even if such an interest exists – it necessarily outweighs a group's right to secede unless that group has been a victim of the three types of injustices specified.

The second criterion is unsatisfactory because it rewards the performance of morally illegitimate actions and, thus, creates a morally sub-optimal environment. Finally, the third criterion simply begs the question of what a morally superior theory of secession is – when it is precisely this question which we are supposed to be answering in the first

at that – lies with would-be secessionist rather than their parent State.

place. In summary, then, while there may well be good reasons for preferring a highly restrictive theory of secession that grants a right to secede in only the three situations favoured by Buchanan, the reasons identified by Buchanan are not amongst them.

4

LIBERAL-DEMOCRATIC THEORIES OF SECESSION

4.1 INTRODUCTION

A. Introduction

The purpose of this chapter is to critically assess the third and final type of secession theory known as Liberal Democratic (LD) theories of secession. As in the case of the two preceding theories, the chapter will begin by first defining the LD theory. After having specified exactly *what* a LD theory is, the remainder of the chapter will be divided up into two substantive sections. The first section revisits the issues of territory and territorial sovereignty briefly introduced in the previous chapter and examines how they relate to the LD theory – particularly that of the leading LD theorist; Harry Beran. Having demonstrated the inadequacy of Beran's account of legitimate territorial sovereignty, the chapter will then make some general remarks about issues of territorial sovereignty and how these relate to the LD theory.

In contrast, the second section of the chapter deals with the important, but nonetheless frequently overlooked, issue of whether or not there can be a *liberal* right to secede from a *liberal* State. A second, related issue also considered is exactly what type of liberalism the LD theory is premised upon. The aim of this discussion is to demonstrate that: (a) there are two, different types of liberalism to which the LD theorist may appeal; and, thus, (b) whether or not there can be a liberal right to secede – particularly a liberal right to secede from a liberal State – will depend upon which of these two variants of liberalism is adopted, each of which has its own advantages and disadvantages.

The first task is, then, to define a LD theory of secession. Put simply, a LD theory endorses the proposition that a group possesses a right to secede if, and only if, a majority of that group's members express a desire to do so. Thus, a LD theory of secession supports what Buchanan terms a *plebiscitary right to secede*, i.e. "...the right of a majority in any portion of the territory of a state to form its own independent state if it so chooses, even if the majority of the state as a whole opposes their bid for independence."[1]

Amongst those theories that favour a plebiscitary right of secession we may distinguish three different, but inter-related, *types* of LD theory. The first type of theory was outlined briefly in Chapter Two, and premises the right to secede upon liberalism's commitment to the freedom of the *individual* as a self-governing chooser. From this conception of individual liberty the requirement that political society approximate, as closely as is possible, a *voluntary*, or *consensual*, scheme is then derived and the claim made that if the majority of a group wish to secede then they *prima facie* should be permitted to do so. Thus, the argument begins by claiming that if we accept liberalism's characterisation of the individual as a self-governing chooser, then we must also accept that each individual enjoys moral dominion regarding themselves such that only their *consent* is sufficient to determine membership of any association – including political associations such as the State.

Moreover, because States have no enforceable moral claims against their subjects other than those to which their subjects have freely consented,[2] individuals have the right to associate politically with whomever they choose to associate with and the only just political divisions are those which reflect the willingness of people to live together.[3] By far the most prominent advocate of this type of LD theory is Harry Beran who, in an impressive series of articles, has built up a detailed theory of secession to

[1] Allen Buchanan, 'Democracy and Secession' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), p.15.

[2] Harry Beran, 'A Liberal Theory of Secession', *Political Studies*, Vol.32, No.1, 1984, p.26.

[3] Michael Freeman, 'The Priority of Function Over Structure: A New Approach to Secession' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.19-20.

rival that of the other secession heavyweight, Allen Buchanan. Other theorists who adopt a similar approach to Beran include Christopher Wellman[4] and David Gauthier.[5]

The second type of LD theory claims that a commitment to democracy and the moral principles that are its concomitants logically entails a commitment to a plebiscitary right of secession.[6] The two main theorists which fall into this category are Philpott and Copp. Philpott adopts a Kantian approach claiming that a moral agent is free when s/he acts according to his/her own free will, pursuing ends which s/he has set for his/herself. From this *principle of individual moral autonomy* Philpott draws three conclusions, the most important of which as far as justifying a right of secession is concerned, is that individuals must be free to shape their political context and, thus, should be governed by democratic institutions in which they can either participate directly or have representatives who are directly accountable to them participate on their behalf.[7] In other words, being autonomous means being self-governing and democracy is simply individuals governing themselves in the political realm.[8] Moreover, claims Philpott, democracy entails a plebiscitary right of secession because political self-determination itself promotes democracy in those groups "...whose members first claim to share an identity for political purposes, and second seek a separate government, as opposed to a larger proportion of representatives in their current State's government."[9]

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[4] Christopher H. Wellman, 'A Defence of Secession and Political Self-Determination', *Philosophy and Public Affairs*, Vol.24, No.2, 1995, pp.143-44.

[5] David Gauthier, 'Breaking Up: An Essay on Secession', *Canadian Journal of Philosophy*, Vol.24, No. 3, September 1994.

[6] Freeman terms this type of theory the 'republican version' of democratic theory as opposed to the former type of theory which he terms the 'liberal version' of democratic theory (Freeman, p.18).

[7] For this part of his argument Philpott appeals to Amy Gutman, 'The Disharmony of Democracy' in *Democratic Community*, ed. John W. Chapman and Ian Shapiro (New York: New York University Press, 1993), pp.126-60; and Robert Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989), p.91. The other two conclusions drawn by Philpott from the principle of individual autonomy are that: (a) individuals possess, and the law of the State should protect, certain negative freedoms such as the freedom of expression, religious worship, association, speech etc; and (b) a society should distribute wealth, opportunities and other goods equitably amongst its citizens. See Daniel Philpott, 'In Defense of Self-Determination', *Ethics*, Vol.105, 1995, pp.356-58.

[8] Philpott, p.357.

[9] Philpott, p.358. For a critical appraisal of Philpott's theory see Buchanan, pp. 17-19.

Copp,[10] on the other hand, offers an original analysis based upon the moral principle of equal respect for persons arguing that a guiding principle of democracy is the proposition that people must be shown equal respect and, thus, given equal authority over political matters. It is, claims Copp, "...an unjust lack of regard for a person to fail to give him or her authority over decisions that affect only his or her own life; it is similarly an unjust lack of regard to fail to give this person equal authority with other members of his or her society over political decisions regarding that society."[11] Furthermore, argues Copp, "[i]f the members of...a society have a stable desire for statehood, it would show a lack of respect for them and their judgment if they were not given the authority to make a decision about statehood."[12]

Finally, the third type of LD theory is advocated by a number of extreme individualist, or so-called *libertarian*, theorists who, in the tradition of Ludwig Von Mises,[13] see the State as unavoidably hostile to individual liberty and argue against principles of (international) distributive justice and a duty of aid to fellow citizens. Concern about the power of the State and an inherent tendency for the State to attempt to increase that power at the cost of individual liberty, leads these theorists to conclude that an individual right of secession is a necessary control upon the State and, hence, an effective means of guaranteeing the freedom of the individual.[14]

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[10] David Copp, 'Democracy and Communal Determination' in *Rethinking Nationalism*, ed. J. Couture, K. Nielsen and M. Seymour (Calgary: University of Calgary Press, 1996). Also see David Copp, 'Do Nations have the Right of Self-Determination?' in *Philosophers Look at Canadian Confederation*, ed. Stanley G. French (Montreal: Canadian Philosophical Association, 1979).

[11] Copp (1996), p.292.

[12] Copp (1996), p.292. For a reply to Copp's theory see Buchanan, p.20.

[13] See, for example, Ludwig Von Mises, *Nation, State and Economy* (New York: New York University Press, 1983) and *Liberalism* (New York: Foundation for Economic Education, 1985).

[14] I have in mind here the following theorists: David Gordon, 'Introduction' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998); Steven Yates, 'When is Political Divorce Justified?' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998); Murray N. Rothbard, 'Nations by Consent: Decomposing the Nation State' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998) and *Ethics of Liberty* (New Jersey: Humanities Press, 1982); Clyde N. Wilson, 'Secession: The Last Bulwark of Our Liberties' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998); Hans-Hermann Hoppe, 'The Western State as Paradigm', *Society*, Vol.35, No.5, 1998 and 'Small is Beautiful and Efficient: The Case for Secession', *Telos*, No.107, 1996; Donald W. Livingstone, 'The Very Idea of Secession' *Society*, Vol.35, No.5, 1998; and Robert W. McGee, 'Secession Reconsidered', *Journal of Libertarian Studies*, Vol.11, No.1, 1994.

This chapter will principally be concerned with the former type of LD theory and, thus, with the writings of Beran, Wellman and Gauthier. While much of what is said below may well be accepted by, or relevant to,[15] these other, less mainstream LD commentators, this is not a matter which will be directly pursued here. It should be emphasised, however, that while these alternative theories put forward by Philpott, Copp and others are largely omitted from discussion, this should by no means be interpreted as a claim that these theories are necessarily unsatisfactory or inferior to Beran's theory.

Rather, because adequately dealing with all three types of theory and the various issues which each raises is beyond the scope of the chapter, it makes sense to pick out one particular type of theory and focus upon it in some detail. The former variant of LD theories has been selected due to the fact that both it and its main proponent – Harry Beran – have come to dominate discussion of LD theories of secession in a manner that has thus-far eluded the other two types of theory. Rightly or wrongly, the position adopted by Beran, Wellman and Gauthier is a great deal more predominant in the secession literature than the other two types of LD theory, with the result that much of the literature on LD theories is either written by them or is directed specifically towards them. Indeed, Beran's theory has come to be viewed as representative of the LD position in much the same way as Buchanan's has of Just Cause theories.

B. Clarifying the Theory Under Consideration

Having now specified which of the three types of LD theory will be addressed[16] and why, it is now necessary to further clarify the theory before going on to evaluate it. As was noted above, the starting point for the LD theory is the principle of voluntary political association, which is itself a product of liberalism's *individualistic moral ontology*. To briefly re-cap: liberalism begins with the view that the individual is the ultimate unit of moral worth, and that individual well-being is dependent upon the freedom to live one's life 'from the inside.' Thus, individuals must be free to live their

[15] Indeed, Beran admits that his theory of secession has much in common with that of libertarian theorists such as Von Mises, Rothbard and McGee. See Harry Beran, 'A Democratic Theory of Political Self-Determination for a New World Order' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.41.

lives in accordance with their own conception of the good life and to obtain knowledge of other, alternative conceptions which, after an appropriate period of critical reflection, they may adopt if they so wish.[17] These precepts then give rise to certain individual rights. For example, the concern that individuals live their lives in accordance with a conception of the good life of their own choosing generates a right for individuals to be free from the coercive interference of others. Similarly, the concern that individuals be free to question their beliefs of the good life, to acquire an awareness of alternative conceptions and critically evaluate these, generates individual rights to freedom of association and expression.[18]

While liberalism is founded upon a strictly *individualistic* moral ontology, this does not mean that liberals cannot recognise the importance of interpersonal cooperation between individuals, or the fact that man is by nature a social creature and human flourishing is impossible without human relations.[19] What it *does* mean, however, is that the liberal cannot attach any *intrinsic* importance to cooperative effort and the collective institutions that it creates, but may view such associations as only possessing an instrumental value strictly proportionate to the contribution that they make towards the well-being of their constituent, individual members.[20] Therefore, it is not that liberals don't value community, or that they deny that individuals are frequently members of groups which influence their conduct and shape their loyalties and identity. Rather, they deny that: (a) moral claims can be attached to such

[16] Which shall henceforth, for reasons of brevity, be referred to simply as 'the LD theory.'

[17] See Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), pp.80-81 and *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), pp.9-13. Also see Brian Barry, 'Nationalism Versus Liberalism', *Nations and Nationality*, Vol.2, No.3, 1996, p.432.

[18] See Kymlicka (1995), p.81. Also see Harry Brighouse, 'Against Nationalism' in *Rethinking Nationalism*, ed. J. Couture, K. Nielsen and M. Seymour (Calgary: Calgary University Press, 1996), p.372. Admittedly, this is something of a simplistic and skeletal definition of liberal thought. However, as Beran quite correctly points out, a commitment to the freedom of the individual to attain genuine self-authorship (i.e. the freedom to live one's life from the inside) is a basic tenet that unites the diverse strands of liberalism. While there are serious disagreements between different types of liberals, these are generally to do with what method of social organisation maximises the freedom to live one's life from the inside, and are beyond the scope of this thesis. See Beran (1984), p.24. Also see Steinberg who Beran cites in support of this claim. Jules Steinberg, *Locke, Rousseau and the Idea of Consent* (Westport: Greenwood Press, 1978), p.24. A similar point is also made by Richard Bellamy, 'Liberalism' in *Contemporary Political Ideologies*, ed. Roger Eatwell and Anthony Wright (New York: Continuum, 1999), p.25.

[19] Refer Michael Hartney, 'Some Confusions Concerning Collective Rights' in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), pp.205-6.

[20] Hartney, pp.206-8.

associations;[21] and (b) that these associations have any value over and above the contribution that they make to the welfare of their individual members.[22]

While this commitment to *value individualism* has been severely criticised by other thinkers – particularly *communitarians* such as Taylor[23] and Sandel[24] – these claims will not be addressed here.[25] This is not to belittle the claims made by communitarians and other, associated critics of liberalism. However, while such claims are both interesting and important[26] they are clearly beyond the scope, not only of this thesis, but in many respects also the contemporary secession debate which, rightly or wrongly, is generally conducted within a liberal framework. While some secession theorists such as Miller and Buchanan may *deny* the LD claim that democratically self-defined groups should possess a plebiscitary right of secession, this does not mean that they reject liberal democracy and the moral principles which are its concomitants. Rather, these theorists *agree* with LD theorists that States should be governed in accordance with the requirements of liberal democracy. However, unlike the LD theorist, they do not believe that the democratic majoritarianism of the LD theory should be employed to determine what the boundaries of those States are. Indeed, one of the reasons Miller

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[21] See, for example, Chandran Kukathas, 'Are There Any Cultural Rights?' in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), p.231. Note that this article originally appeared in *Political Theory*, Vol.20, 1992.

[22] See, for example, Kymlicka, (1989), p.140.

[23] See, for example, Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985); 'Shared and Divergent Values' in *Options For a New Canada*, ed. Ronald Watts and D. Brown (Tornonto: University of Toronto Press, 1991); and 'The Politics of Recognition' in *Multiculturalism and the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1992).

[24] See, for example, Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); 'The Procedural Republic and the Unencumbered Self', *Political Theory*, Vol.12, No.1, 1984; and 'Freedom of Conscience or Freedom of Choice' in *Articles of Faith, Articles of Peace*, ed. James Hunter and O. Guinness (Washington: Brookings Institute, 1990).

[25] For a good summary of the communitarian case against liberalism, and some responses to it, see Kymlicka (1989), pp.47-70; and 'Community' in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Oxford: Basil Blackwell, 1993). Also see Allen Buchanan, 'Assessing the Communitarian Critique of Liberalism', *Ethics*, Vol.99, No.4, 1989; and Omar Dahbour, 'The Nation-State as a Political Community: A Critique of the Communitarian Argument for National Self-Determination' in *Rethinking Nationalism*, ed. J. Couture, K. Nielsen and M. Seymour (Calgary: Calgary University Press, 1996), pp.316-21.

[26] Although this is not say that there are not some good, liberal replies to the criticisms made by communitarian thinkers. For example, refer, again, to Kymlicka (1989), pp.47-70; and Buchanan (1989).

and Buchanan give for rejecting the LD theory is precisely the claim that its general adoption would undermine liberal-democratic institutions of governance.[27]

Given that unless we can agree on certain fundamental precepts then there may not be enough common ground to discuss certain issues sensibly any further, not only would attempting to critically engage these liberal-based theories of secession from, say, a communitarian standpoint appear to be rather difficult, it is also hard to see what benefits or insights might be produced by such an undertaking. This is not to say that one might not construct a normative theory of secession from, say, a communitarian perspective. However, the present task is to critically engage with, and say something substantive about, existing normative theories of secession which are constructed within a liberal paradigm. In order to accomplish this task within the allotted pages of this thesis it is necessary to start from a position that takes certain propositions as given, while putting the relative merits and weaknesses of liberalism as compared to other, competing ideologies to one side. Moreover, an *internal* critique based upon factors which liberals regard as significant poses a more serious threat to the LD theory than one premised upon considerations which liberals would reject or consider questionable.

An example of the sort of collective institution favoured by liberals as capable of making an effective contribution to the realisation of individual freedom is the State. Typically liberals tend to agree that through the application of its coercive mechanisms the State may play a positive role in providing an environment in which the liberal ideal of individuals leading their lives 'from the inside' may be effectively realised. For example, by attaching penalties to the performance of actions which infringe the individual rights of others the State, through its legal institutions, intervenes in the practical deliberations of individuals by rigging the consequences of right-infringing

[27] See, for example, Buchanan (1998), pp.21ff; and 'Theories of Secession', *Philosophy and Public Affairs*, Vol.26, No.1, 1997, pp.47-49. Similarly, it will be remembered from Chapter Two that Miller argues that a right of secession should be granted to nations – as opposed to, say, democratically self-defined groups – because doing so will maximise the social pre-conditions necessary to the effective functioning of democracy. See David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), pp.96-98. My point is simply that, while there is serious disagreement amongst the various contributors to the secession debate over which sorts of entities possess a right to secede and why, most commentators nonetheless maintain a commitment to liberalism.

actions.[28] Conversely, without the laws of the State intervening in the practical deliberations of individuals and upholding basic rights and liberties, individuals would have insufficient reason to not interfere with the rights of other individuals.[29] Hence by providing an incentive for individuals to refrain from infringing the rights of others the State reduces the performance of right-infringing actions and, thus, produces an environment that, from a liberal perspective, is superior to that which would obtain in its absence.[30]

However, while liberals tend to agree that the State has a positive role to play in providing an environment conducive to the realisation of the liberal ideal of individual self-authorship, there is nonetheless wide disagreement amongst liberals as to how far the State should go in such an endeavour. This is an on-going debate all too familiar to political theorists where numerous positions have been staked out by a variety of theorists ranging from the so-called 'welfare liberalism' of T. H. Green,[31] to the minimalistic State advocated by theorists such as Nozick.[32] Thus, while liberals may *agree* that political society is a preferable alternative to a State-less environment various strands of liberalism nonetheless *dis*agree as to the proper nature and extent of that State.[33]

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[28] Thus, if the penalty for assault is five hundred dollars then E is still free to assault P (i.e. E is still physically capable of assaulting P), however the simple option of assaulting P is no longer available. The options have been 'rigged' by the State from: (a) assaulting P or not assaulting P; to (b) assaulting P and paying five hundred dollars or not assaulting P. The intended effect of the penalty is to decrease the desire to perform the action in question to a sufficient degree which ensures that in most (if not all) cases the action of assault will not be performed. On whether or not this constitutes a condition of unfreedom refer, for example, to Hillel Steiner, 'Individual Liberty', *Proceedings of the Aristotelian Society*, Vol.75, 1974-75, p.33.

[29] See Wellman, p.156.

[30] Obviously for such a system to work a number of conditions must be met, e.g. there must be a sufficiently high likelihood of being caught and thus having the sanction applied and the sanction must be sufficiently severe to deter the type of action in question. These are the two obvious provisos although there may, of course, be others. If, for example, the penalty is *too* high then it may prove counter-productive, e.g. a common argument against raising the penalty for rape so that it approximates the penalty for murder, is that it encourages the rapist to murder his victim in order to minimise the likelihood of being caught and thus having the (increased) sanction applied.

[31] See Thomas Hill Green, *Lectures on the Principles of Political Obligation* (London: Longmans, 1921) and *Prolegomena to Ethics* (Oxford: Clarendon Press, 1884).

[32] Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974).

[33] Refer Keith Dowding, 'Secession and Isolation' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.72-73. Also see above and Beran (1984), p.24.

It is clear, however, that liberalism's commitment to the individual as a self-governing chooser creates a problem in justifying coercive institutions such as the State. As was noted in Chapter Two, if the individual stands in a position of complete moral dominion over him/herself such that no second party is justified in coercing him/her providing his/her actions do not harm others, then by issuing legally binding directives that make certain actions mandatory and others forbidden, using the threat of sanctions to ensure compliance with these directives and coercing non-compliers, existing States must illegitimately interfere in the lives of their subjects.[34] If the individual occupies a position of moral dominion regarding his/her own affairs, how can the State be justified in encroaching upon this domain and restricting the value which liberalism seeks to promote (i.e. individual liberty)?[35]

One response to this problem is, of course, simply to say that the State's coercive authority is legitimate in as much as it is the best instrument to secure the rights of others. Another, alternative response favoured by Beran is termed the Consent Theory of Political Obligation[36] and attempts to reconcile the value of individual freedom with the State's exercise of coercive authority, by claiming that the legitimacy of the State is based upon the consent of its citizens. Because, under the Consent Theory, the obligation which agents have to obey the State is a self-assumed one (i.e. a product of an individual's own, voluntary actions[37]) it is argued that there is no inconsistency in maintaining both that the individual is free *and* that the State is morally justified in restricting that freedom.[38]

This principle of voluntary political association that underpins the Consent Theory also provides the basis for the LD theory of secession. If only the individual's free

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[34] See, for example, Wellman, p.155.

[35] Wellman, p.150.

[36] Hereafter referred to simply as 'the Consent Theory.'

[37] See A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), p.64.

[38] There are, of course, conditions which must first be met if an individual's consent is to generate an obligation for that individual to obey the State – particularly with respect to so-called 'tacit' consent where consent is given by failing to do certain things rather than being expressed by action. For example: consent must be given intentionally and knowingly; consent must be given voluntarily; individuals must be aware of the situation and that consent is being requested; there must be a reasonable period of time for expression of dissent; it must be reasonably easy to express dissent; and the consequences of dissent must not penalise such expressions (Simmons, pp.64ff especially pp.80-83).

consent is sufficient to determine membership of a political union, then individuals have the right to associate politically with whomever they wish and, *a fortiori*, the only just political divisions are those which reflect the willingness of people to live together.[39] Of course, in some senses the relationship between the individual and the State already *is* voluntary as, at least in most cases, individuals have a right to emigrate or change their nationality.[40] However, while individuals are generally free to leave their parent State and join another already existing State,[41] this voluntarism has yet to be applied to the unity of the State itself. This, the LD theory claims, is a mistake. A commitment to the freedom of self-governing choosers to live in societies that approximate as closely as is possible voluntary schemes[42] requires that secession be permitted whenever possible.[43]

From the requirement that the unity of a State be based upon the willingness of its citizens to be a part of that State, Beran appeals to what he terms a *right of habitation* to conclude that geographically concentrated groups of individuals referred to as *territorial communities* possess a right to secede if, and only if, a majority of their members favour secession.[44] However, while a majority in favour of secession is a *necessary* condition for the possession of a right to secede it is not a *sufficient* condition, i.e. Beran subordinates the right to considerations of stability and viability by the inclusion of certain conditions, or side constraints, which would-be secessionists must first fulfil if their secession is to be morally justified.[45]

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[39] Freeman, pp.19-20. Both Gauthier and Beran, draw an analogy between the right of the individual to determine his/her personal relationships, and the right to determine one's political relationships. Thus, just as each individual has a right to freely determine who they marry, who they work for and who they socialise with so they should be free to determine who they associate with politically in the same State. Moreover, such relationships are not irrevocable – just as one may divorce one's spouse, quit one's job and sever friendships so one should be permitted to withdraw from a political association (Beran (1984), pp.24-25; and Gauthier, pp360ff).

[40] See Beran (1998), p.35. Also see Beran (1984), p.26.

[41] Assuming, of course, that they can in fact find another State which they want to join and which is also willing to have them.

[42] See J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1972), p.13.

[43] Beran (1984), pp.24-25.

[44] The twin notions of a right of habitation and territorial communities will be addressed in greater detail below.

[45] Beran specifies six such constraints: (a) the group must be sufficiently large to assume the basic responsibilities of a State; (b) the group must be prepared to allow sub-groups the right to secede; (c) the group must not wish to exploit or oppress sub-groups; (d) the group's secession must not produce a territorial enclave; (e) the group must not occupy an area which is culturally, economically or militarily

For the moment, then, the LD theory may be summarised as the following set of four propositions: (1) Normal adults have the right of personal self-determination and, thus, freedom of association with willing partners. (2) This principle of voluntary political association justifies an individual right of emigration and a right for democratically self-defined *groups* of individuals to secede. (3) A group's right to secede must be determined by majoritarian means, i.e. a necessary condition for a group to possess a right of secession is the requirement that a majority of the constituent members of that group express a desire to secede. (4) The right may be further restricted by certain side constraints which the would-be secessionists must also fulfil if they are to possess a right of secession.[46]

4.2 ISSUES OF TERRITORY AND THE IDENTITY OF THE RIGHT-HOLDER

A. Introduction

One of the more curious features of Beran's theory is the manner in which he begins with a commitment to normative individualism and yet concludes with a thesis of democratic majoritarianism. Whereas the former suggests that each individual has the right to secede unilaterally from any State to which they fail to give (or subsequently retract) their consent,[47] the latter entails that the right is possessed by *groups* of individuals which Beran terms 'territorial communities.' The purpose of the discussion that follows is to take a critical look at this feature of Beran's theory and also the wider issue of the proper role of legitimate territorial sovereignty in a liberal theory of secession.

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essential to the parent State; and (f) the group must not occupy an area which has a disproportionately high share of the economic resources of the existing State. See Harry Beran, *The Consent Theory of Political Obligation* (Sydney: Croom Helm, 1987), p.42. These restrictions are further clarified in Beran (1998), pp.46ff.

[46] e.g. the considerations of viability and stability discussed above. In other words, the expression of a majority of individuals within a geographical area of a desire to secede is a *necessary*, but not *sufficient*, condition for possession of the right to secede. The group must also satisfy these other, additional conditions to possess such a right. Thus, the right to secede is not indefeasible and may, therefore, be overridden by other, conflicting rights.

[47] The proposition that individuals possess a right of unilateral secession is generally characteristic of the above-mentioned extreme individualist, or libertarian, secession theorists. See, for example, Hoppe and Livingstone.

The first task is to spell out exactly what Beran means by the two terms of a 'right of habitation' and 'territorial community.' Whereas both Wellman and Gauthier largely ignore the question of territory and do not make possession of legitimate territorial sovereignty a necessary pre-condition to possession of a right to secede,[48] Beran claims that in order to possess a right to secede a group must first qualify for a right to occupy the territory on which they live – a right of habitation. Underlying this territorial component of his theory is Brilmayer's observation that in the absence of a non-territorial delineation of political sovereignty, a right to secede – unlike, say, a right to emigrate or change one's nationality – is necessarily defined in terms of the removal of territory from the State. Therefore, to grant a right of secession is, *ex hypothesi*, to grant a right of territorial sovereignty and this raises the question of exactly *what* territory and why.[49] In recognition of this fact Beran notes:

> ...the distinction between emigration and secession is important, because the former does not involve the removal of territory from the state while the latter does. An individual or family has the right to emigrate from their state, but it is by no means obvious that they have the right to remove territory from the state which they wish to leave. Any theory of rightful secession has to specify what sorts of groups have the right not only to leave their state but to leave it with their territory: in other words, have *the right of continuing occupation of their territory* (the right of habitation).[50]

The difficulty now is to specify exactly what types of entities qualify for Beran's right of habitation. Nations are one possible candidate, but Beran believes that there may be

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[48] On the subject of territory Gauthier writes: "...I regard the territorial claims of political communities as strictly derivative from what might be called claims of habitation by individuals. If most of the persons actually inhabiting a particular territory wish to establish a political community among and restricted to themselves, then their claims of habitation provide a basis for the territorial claim of the community they establish – and a basis that normally overrides any other territorial claims." See Gauthier, p.369. Similarly, Wellman does not distinguish between a right of secession and an antecedent right to territorial sovereignty, but argues that to demonstrate that an agent possesses a right to secede is to also demonstrate that that party possesses legitimate territorial sovereignty (e.g. see Wellman's discussion of Buchanan on pp.144-45 and pp.152-53). While both theorists fail to explicitly address the objection that the LD theory begs the question of what the relevant constituency is in which a plebiscite may be held (see Allen Buchanan, 'Self-Determination, Secession, and the Rule of Law' in *The Morality of Nationalism*, ed. Robert McKim and Jeff McMahan (New York: Oxford University Press, 1997), pp.314-15; and Freeman, p.24) Wellman appears to agree with Gauthier that such issues should be determined by claims of habitation arguing that "...any group able and willing to perform the functions required of a liberal political state *has a claim to the territory it occupies*..." Wellman, p.164 [emphasis added].

[49] See Lea Brilmayer, 'Secession and Self Determination: A Territorial Re-Interpretation', *Yale Journal of International Law*, Vol.16, No.1, January 1991, p.201.

[50] Beran (1998), p.35 [emphasis added].

other, smaller social groups – which he refers to as territorial communities – that also have a right of habitation. Beran defines a territorial community as:

> ...a social group that has a common habitat, consists of numerous families (i.e. is larger and more complex than a family), and is capable of self-perpetuation through time as a distinct identity. Its members have direct and many-sided relationships to each other, have some common interests, have a sense of belonging to the group...and are conscious of themselves as a distinct group... Territorial communities can range from small ones, such as villages, to large ones, such as nations. The latter can perhaps be thought of as communities of communities and as communities in their own right.[51]

Because the territorial community is the smallest possible unit which may qualify for a right of habitation, it is at the level of the territorial community that the decision to secede or not to secede is made, by holding a referendum on the issue in order to determine whether or not a majority of the community's members are in favour of seceding. Thus, for Beran the right to secede is a *collective* right held and exercised by groups of individuals known as territorial communities, that is derived from a set of antecedent individual rights to autonomy and freedom of association. Individuals, claims Beran, have the right to free association and this includes the right to form territorial communities on land they rightfully own or acquire. Moreover, "[t]erritorial communities have the right to maintain themselves, and for this they need territory."[52] While a territorial community *may* be able to maintain itself if forced to move to a new location against its will, there remains a high risk of disintegration. Conversely, because individuals and families can quite readily survive relocation Beran concludes that they only have a right of emigration whereas "...[territorial] communities have the right of habitation [and therefore a right of secession], provided they have acquired their land rightfully."[53]

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[51] Beran (1998), p.36. Despite the fact that Beran elsewhere rejects Nationalist theories of secession (see Harry Beran, 'Border Disputes and the Right of National Self-Determination', *History of European Ideas*, Vol.16, No.4-6, 1993), his definition of a territorial community sounds remarkably like the subjective/objective hybrid definition of a nation given by theorists such as Tamir and Margalit and Raz. Tamir, it will be remembered, claims that a group of individuals constitute a nation when they: (a) exhibit a sufficient number of shared objective characteristics such as a common culture, history, language etc.; and (b) are *conscious* of their distinctiveness and are bound together by a sense of solidarity which this consciousness creates. Also see Avishai Margalit and Joseph Raz, 'National Self-Determination', *Journal of Philosophy*, Vol.87, No.9, (1990).

[52] Beran (1998), p.36.

[53] Beran (1998), p.36. Similarly, elsewhere Beran claims that "...if a group *rightfully* occupies part of the

Finally, because within larger territorial communities – the overall majority of whose members may favour secession – there may be smaller territorial communities who do not favour secession, Beran proposes the repeated use of the majority principle through a process of reiterated referenda held in each territorial community:

> ...a separatist movement can call for a referendum, within a territory specified by it, to determine whether there should be a change in this territory's political status, e.g. whether it should secede from its state. If there is a majority in the territory as a whole for secession, then the territory's people may exercise its right of self-determination and secede. But there may be people within this territory who do not wish to be a part of the newly independent state. They could show, by majority vote within their territory, that this is so, and then become independent in turn, or remain within the state from which the others wish to secede.[54]

As an example of such a scenario Beran cites the case of the former Yugoslavia where a majority of Croats were in favour of secession, but in the portion of Croatia known as Krajina which was populated mostly by Serbs, there was a majority *against* secession. Under Beran's theory, the larger territorial community of Croatia would have been justified in seceding from the former Yugoslav Federation subsequent to a referendum confirming that a majority of Croats did in fact favour such a move. This would then have been followed by another referendum in Kraijina (and any other similar dissident territorial communities like it) to determine whether Kraijina stayed within the Serb-dominated former Yugoslavia, became a part of the nascent State of Croatia or formed their own independent State.[55]

To summarise: under Beran's theory, in order to possess a right to secede a group must have a right of habitation. In order to qualify for a right of habitation – which is essentially a theory of legitimate territorial sovereignty – a group must not only: (1) qualify as a territorial community by fulfilling the above sociological criteria; they

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territory of the existing state, that territory primarily belongs to that group." See Harry Beran, , 'The Place of Secession in Liberal Democratic Theory' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994), p.61 [emphasis added].

[54] Beran (1998), p.38.

[55] Refer Beran (1998), p.38. Beran neglects to mention the third option of independent Statehood and discusses the issue only in terms of Kraijina: (a) remaining within Yugoslavia; or (b) breaking away from it as a part of the new State of Croatia. Presumably this is because there was never a discernible desire on the part of the people of Kraijina to form an independent State. However, it is worth pointing out that as a distinct territorial community they would, under Beran's theory, nonetheless have been justified in forming their own State had they so wished.

must also (2) be the traditional occupants of a territory that they acquired as a result of a transaction, or series of transactions, which accord with certain antecedent principles of procedural justice;[56] and (3) demonstrate that continued occupancy of their traditional territory is essential to the maintenance of their identity as a distinct territorial community.[57]

B. A Critical Assessment of Beran's Right of Habitation

A common objection to the LD theory of secession is that ascribing a plebiscitary right of secession to democratically self-defined groups simply begs the question of what is the relevant constituency in which such a plebiscite might be held.[58] In other words, even if we agree that separatist conflicts should be decided democratically by a majority vote, there will remain the difficulty of specifying *what* the relevant democratic unit is – a question that cannot itself be answered democratically.[59] Alternatively, as another writer puts it: "...the people cannot decide [issues of political

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[56] A condition which, it should be noted, requires a theory of property rights.

[57] This emphasis upon so-called territorial communities as the legitimate holders of a right to secede, and the requirement that in order to possess a right to secede a group must first demonstrate that there is a necessary connection between continued occupancy of its traditional territory and the maintenance of its distinct identity, appears to be something of a departure from Beran's prior position. Previously, in response to the objection that a plebiscitary right of secession begged the question of what the constituency in which such a plebiscite might be held is, Beran simply stated that a secessionist group should specify the constituency that votes on the issue of secession, as if *all* the citizens of the State were permitted to vote then they could outvote the secessionists with the result that the resultant political union would be involuntary (Beran (1993), p.485 and (1984), p.27). A similar approach is adopted by Philpott who argues that it is wrong to claim that all the citizens of a State should have a say in whether or not a sub-group within that State has the right to secede as one does not have the autonomy to restrict another's autonomy and, *a fortiori*, one's autonomy is thus not restricted when one no longer has a say in how others are governed (Philpott, p.363). While it is true that Beran *has* previously stated that "...a community which is the traditional occupant of a territory has a moral right to continue to inhabit this territory" (Beran (1994), p.56) he doesn't go into any detail as to why this might be so or what the source of such a right of continued habitation might be.

[58] Theorists such as Caney and Ryan argue that ascribing a right of political self-determination to 'the people' simply begs the question of who counts as the people and, thus, what the relevant democratic unit in which a plebiscite might be held is. For example, Caney questions whether, when in 1988 the citizens of France voted to deny New Caledonia the right secede, the decision was legitimate (Simon Caney, 'National Self-Determination and National Secession: Individualistic and Communitarian Approaches' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), pp.154-55) whereas Ryan raises the same question with respect to Northern Ireland by asking whether the future of Northern Ireland should be decided by a vote in Northern Ireland alone, the whole of Ireland, or the U.K (Stephen Ryan, no title, *Politics and the Life Sciences*, Vol.16, No.2, 1997, p.269). On this issue also see Margalit and Raz, p.456; Brian Barry, 'Self-Government Revisited' in *The Nature of Political Theory*, ed. David Miller and Larry Siedentop (Oxford: Clarendon Press, 1983), p.127; and Visuvanathan Rudrakumaran, 'The Requirement of Plebiscite in Territorial Rapprochement', *Houston Journal of International Law*, Vol.12, No.1, 1989, pp.49-51.

[59] Margalit and Raz, p.456.

borders] until someone [first] decides who are the people."[60] In response Beran claims that the reiterated use of the majority principle effectively overcomes this difficulty because it "...always yields a determinate result...[and] maximises the number of individuals who live in mutually desired political association, an ideal implicit in the right of freedom of association..."[61]

However, making territorial communities the bearers of a right of secession does *not* -- despite Beran's claims to the contrary -- resolve the problem of who counts as the people, but simply succeeds in replacing the term 'the people' with the alternative of 'a territorial community.' Even if we *agree* that territorial communities should be the bearers of a right to secede, there is likely to remain residual *dis*agreement over what groups qualify as territorial communities.[62] Beran's definition of a territorial community is of no assistance in resolving such disputes because, as was noted in Chapter Two, factors such as a sense of belonging, the possession of a distinct identity and an awareness of being different from other groups are all matters of degree and interpretation.

Indeed, there is a fundamental difficulty in appealing to notions of group membership in order to identify candidates for a right to secede, when secessionist disputes are themselves frequently a result of conflicting accounts of who qualifies as a separate 'people' or 'nation.' For example, while the East Timorese may conceive of themselves as a distinct group and possess a strong sense of inter-personal solidarity and identify with one another as East Timorese, the same is true of many Indonesians who conceive of themselves as members of a broader Indonesian community that *includes* the people of East Timor. Similarly, while Kashmiris frequently appeal to a sense of Kashmiri nationalism in an attempt to justify their secession from India, many Indians deny that Kashmir has a right to secede precisely because they see Kashmiris as members of a wider Indian nation.

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[60] Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1956), p.56.

[61] Beran (1998), pp.38-39.

[62] And, *a fortiori*, holders of a right to secede. For example, see Linda Bishai, 'Altered States: Secession and the Problems of Liberal Theory' in *Theories of Secession*, ed. Percy B. Lehning (New York:

Who, then, is the community – the people of East Timor *simpliciter*, or the people of Indonesia *including* the people of East Timor? Who are the nation – the Kashmiris or the people of India *together with* the inhabitants of Kashmir?[63] It is difficult to understand how notions of a shared identity, a sense of belonging and self-awareness might be employed to distinguish between different groups in order to identify candidates for a right of secession, when divergent interpretations of such features are the very reason that many secessionist disputes exist in the first place.

Suppose we put the difficulties of distinguishing between territorial communities to one side. It is evident that not all so-called territorial communities will fulfil both of Beran's latter criteria. For example, a group might need its territory in order to maintain its distinctive communal existence yet have a relatively weak historical claim to it.[64] Conversely, a group might possess a relatively strong historical claim to its territory, yet be quite capable of maintaining its communal identity in another, alternative territory or even with no territory at all.[65] Indeed, it is questionable as to just how many groups would in fact be capable of demonstrating a necessary connection between the continued occupancy of their traditional territory and the maintenance of their communal identity. As immigrant communities all around the world demonstrate, it is quite possible for groups to maintain their language, identity and cultural norms despite being far removed from their traditional homeland.

Routledge, 1998), p.101.

[63] There is also the associated issue of whether or not only the indigenous people of a territory should be entitled to vote in the plebiscite or whether the right should be extended to settlers and, if so, whether only long-term or more recent settlers may participate. For example, Argentina rejects the notion of a plebiscite as a means of resolving its dispute with Britain over the Falkland Islands by arguing that the indigenous population of the islands were forcibly evicted by the British colonial administration and replaced by a population of British origin. The same reason is given by Spain in its rejection of a plebiscite to settle the dispute with Britain over Gibraltar. See Rudrakumaran, pp.41-45.

[64] See Freeman, p.24. On the one hand, it is not difficult to understand the moral imperatives which underlie Beran's requirement of just acquisition; clearly we do not want to legitimate the unjust taking of territory or reward aggressive acts of unjust appropriation. Although this is not to say that such a requirement does not raise numerous difficulties. For example, in addition to the question of what counts as the just acquisition of territory, there is also the problem that the circumstances of acquisition may simply be unknown or subject to dispute and that most existing States have acquired the territory over which they currently claim sovereignty through morally questionable means. On this latter point see, for example, Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Oxford: Westview Press, 1991), pp.109-110; and Jeffrey Reiman, 'Can Nations Have Moral Rights to Territory' in *The Territorial Rights of Nations and Peoples*, ed. John R. Jacobson (Lewiston: Edwin Mellen Press, 1989), p.164.

[65] Also, as Freeman points out, both the historical and communal grounds may give more than one group a right to the same territory and hence produce conflict (Freeman, p.24).

Furthermore, different territorial communities may be geographically inter-twined and/or claim (parts of) the same territory as essential to the maintenance of their distinctive lifestyles. Once again, Beran's right of habitation simply begs the question it is supposed to answer, as it is precisely such disputes over territory and its significance to the identity of various competing groups which often produce secessionist disputes in the first place. For example, both Israelis and Palestinians claim sovereignty over the holy city of Jerusalem and numerous other sites in the West Bank (e.g. Hebron), which are of religious and historical significance to both communities. Alternatively, consider the 1992 communal riots in India which were sparked when a Mosque in the small town of Ayodhya was demolished by religious fanatics who wanted to construct a Hindu temple on the site.[66] It is unclear how we might settle territorial disputes between warring groups – not to mention identify candidates for secession – by asking whether or not a particular territory is important to a group's identity, when it is *precisely because* the same territory is claimed as essential to the respective identities of two or more groups that these sorts of conflicts exist in the first place.

Beran claims that liberalism stipulates that *the people* possess sovereignty with the result that "the moral rights of rulers can be derived only from the…voluntary acceptance of certain political arrangements [and that]…there can be no [legitimate] political authority without the consent of the governed."[67] But if the State's authority over its subjects is contingent upon the free consent of those subjects, then presumably the same is true of the State's authority over its (subjects') territory. Indeed, it is for this reason that Beran rejects Buchanan's agent/trustee model of territorial sovereignty[68] claiming that: "[i]f the people are the principal in the political unit and the State merely its agent, then the primary right to the territory of the state must belong to the people, not the state."[69]

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[66] The so-called Babri Mosque is believed to have been built by the *Moghul* emperor Babur, after a Hindu temple on the site which marked the birthplace of the Hindu god Lord Rama had been demolished to make way for it. See Peter Van der Veer, 'Ayodhya and Somnath: Eternal Shrines, Contested Histories', *Social Research*, Vol.59. No.1, 1992, p.97.

[67] Beran (1984), pp.25-26.

[68] See Buchanan (1991), pp.108-110

[69] Beran (1994), p.61. Elsewhere, in relation to Buchanan's agent/trustee model of territorial sovereignty, Beran similarly notes that the State's right to territory must be derived from the people whose agent it is and thus "…if a substantial part of a state's population no longer wishes the present state to be its agent, it

> ...the sovereignty of the people cannot be an essentially collective property which can only be exercised by all the citizens of an existing state within eternally immutable borders. Instead, this sovereignty must be composed of the moral rights of individuals to decide their political relationships. Liberalism grants this for individual citizens by acknowledging their right to emigrate and to change their nationality.[70]

But why not also a right to secede? Why is it that liberalism justifies a right of secession only for certain groups, but individuals and other types of groups such as families must make do with a right to emigrate or to change their nationality? The answer is, of course, that secession necessarily involves a claim to territory whereas emigrating or changing one's nationality do not. Hence, in order to possess a right to secede a group must first possess sovereignty over the territory which it wants to take with it and that, according to Beran, means that the group must qualify for a right of habitation by fulfilling the three criteria listed above.

Indeed, secession *does* contain a territorial element – and thus a claim to legitimate territorial sovereignty – that is absent in the act of immigration or changing one's nationality. To grant a group the right to secede is, in the contemporary world of territorial States, to grant that group the right to remove a portion of the parent State's territory. There are, then, two concerns underlying Beran's preoccupation with legitimate territorial sovereignty. The first concern is that to grant a right of secession is (*pace* Brilmayer) to grant a right of territorial sovereignty and this raises the question of exactly *what* territory and why that territory as opposed to some alternative territory. The second concern is that if, as Beran suggests, secessionist disputes are to be settled by referenda then we must first have a principle that tells us what the relevant territorial unit is in which such a referendum might be held. Beran's response to both these difficulties is, of course, to appeal to what he terms 'a right of habitation' that defines the holder of a right to secede as both a collective *and* a territorial entity.

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may terminate the agency relationship and remove itself from the state with its land." See Beran (1998), p.35.

[70] Beran (1984), p.26. Also see Harry Beran, 'Self-Determination: A Philosophical Perspective' in *Self-Determination in the Commonwealth*, ed. W. J. A. Macartney (Aberdeen: Aberdeen University Press, 1988), p.28.

Of course, different theories of secession may take different conditions as sufficient to generate a right of legitimate territorial sovereignty.[71] However, while there may be a variety of different accounts of how a group might acquire sovereignty over a given territory, any such account must not only be *internally* consistent, it must also be consistent with the principle that justifies a group's right to secede in the first place. Beran's right of habitation fails both of these tests: not only are there problems within each of the three criteria that make up his right of habitation, but they may conflict with one another *and* with the liberal principle of voluntary political association to which he subscribes.[72]

For example, a group of individuals might express a desire to secede, yet remain unable to demonstrate that continued habitation of their territory is necessary to the maintenance of their distinct communal identity. Under Beran's account because this group would fail to qualify for a right of habitation it would also fail to qualify for a right to secede, and consequently have to remain within its parent State against its will – a clear violation of the liberal requirement that political associations be voluntary. To grant a right of secession only to those groups who need to remain in their territory in order to retain their distinctive way of life, is to make the right to secede a derivative of a prior right to cultural preservation rather than the right to freely determine one's political associations. Indeed, because the bearers of Beran's right of secession are not democratically self-defined groups which express a desire to secede, but rather cultural collectivities which need their territory to maintain their distinct identity, his theory turns out to be more *nationalistic* than liberal.[73]

C. The Need for a Liberal Theory of Territorial Sovereignty

The first thing to note, then, is that if the important thing is the liberal freedom of individuals to determine their membership in political associations, then there is no

[71] i.e. as was noted in the previous chapter, making legitimate territorial sovereignty a necessary pre-condition to the possession of a right to secede will not, by itself, bring us any closer to arriving at a satisfactory theory of secession. Rather, it simply raises the additional question of under what conditions does a group possess legitimate territorial sovereignty.

[72] i.e. the notion that individuals should be free to determine their political associations and that this freedom generates a right of secession.

[73] A point also made by Freeman (Freeman, p.24).

liberal reason to suppose that a group of individuals should have to share a common identity or affiliation with any particular piece of territory to exercise their right of freedom of association. The second, more general, point to be made is that if the overriding concern is the right of individuals to determine their political associations, then issues of territorial sovereignty need not be anterior to the determination of whether or not a given group possesses a right to secede. Rather, we may conclude what types of groups qualify for a right to secede without first determining what territory they are entitled to take with them when they secede, i.e. we do not need to resolve competing territorial claims in order to determine in what types of situation a group's secession may be justified under a LD theory.

In Chapter Three it was pointed out that the simple requirement that a group possess legitimate title to the territory that it covets in order to possess a right to secede will not, on its own, tell us which groups possess a right to secede. Rather, making legitimate territorial sovereignty a necessary pre-condition to possession of a right to secede simply changes the question from when a group possesses a right to secede, to when it possesses legitimate territorial sovereignty. On the other hand, however, to grant a right to secede is, in the contemporary world of territorially defined States, also to grant a right of legitimate territorial sovereignty and we need to inquire what territory a group is entitled to take with them when they secede, and why *that* territory as opposed to some alternative territory or no territory at all.

However, while it is true that acceptance of the territorial delineation of States makes legitimate sovereignty over a territory a necessary pre-condition to the exercise of a right to secede, we may still agree that a given group possesses a *prima facie* right of secession without first determining what territory that group is entitled to when it secedes. This is not to deny that where the State is a territorially defined entity then a right to independent Statehood is substantively empty with an accompanying legitimate territorial claim. If a State requires a territory then a group's right to secede and establish its own independent State is vacuous if that group does not have a territory in which such a State may be founded. Nonetheless, it does not follow from this that issues of territorial sovereignty must necessarily be dealt with *prior* to the issue of determining the identity of the right-holder. We may sensibly discuss the conditions

under which a group may qualify for a right of secession without first settling issues of how that theory might deal with disputes over territorial sovereignty in specific cases.

Analogously, we may – and generally *do* – recognise a primary right for agents to own private property without first specifying exactly what goods each agent is entitled to and settling competing claims by two or more individuals to the same good. Private property rights and all the derivative rights that normally flow from them – e.g. to dispose of, make use of and deny others access to a particular good – are meaningless unless one first possesses a property right in a particular good. One cannot legitimately deny others access to a particular good unless one first possesses a legitimate property right in that good. Nonetheless, we may still adduce the conditions under which agents qualify for private property rights, the limitations placed upon such rights, and the conditions under which property rights are out-weighed or voided, without first settling issues raised by the implementation of the general principle in specific cases by determining what goods belong to whom. Indeed, it is not until we have first properly elucidated the general principle that its application in specific cases can be adequately addressed.

At this point it may be objected, however, that in the case of the LD theory the two issues of determining the right-holder and the territory that the right-holder is entitled to take with them when they secede can neither be separated from, nor discussed independently of, one another. Rather, because the identity of the group doing the seceding is itself determined by territorial criteria through the holding of a plebiscite in a geographically defined region, the two issues necessarily go hand-in-hand. By drawing a boundary around a geographical area and holding a plebiscite amongst the inhabitants of that area – the outcome of which will determine whether or not there exists a right to secede – the LD theory concurrently determines both who has a right to secede and what territory they are entitled to take with them should they vote in favour of political independence.

As was noted earlier, however, it is unclear what *liberal* reason there might be for distinguishing candidates for a right to secede on an exclusively territorial basis. Rather, if the important consideration is that political associations are voluntary, then if

a group of individuals together decide that they want to secede and live together in a State of their own, this on its own should be sufficient to generate a *prima facie* right of secession. Where the concern is to maximise the number of individuals who live in mutually desired association, then what matters is the desire to associate with each other, not that would-be secessionists inhabit a common territory or share a common identity. The problem with Beran's theory of rightful habitation by territorial communities, however, is that rather than maximising the number of individuals who live in mutually desired association, it instead grants a right to coerce others to secede by virtue of being a numerical majority in an arbitrarily-defined territorial entity

Indeed, not only does a geographical delineation of group identity legitimate the coercion of individuals who have the misfortune to be included within a territorial community as a minority, but it also mitigates against groups who are territorially dispersed. Moreover, the very reason that a group of individuals who share certain features wish to live together in a common State, may be precisely because they are geographically dispersed and do not yet have a shared territory in which they may form an independent political association. Consider, for example, the case of Jewish people post World War Two who were geographically dispersed across Europe and parts of the Middle East and who desired the relative security offered by an independent, Jewish State. Had a *geographical* boundary been drawn around these groups, and a plebiscite held on the creation of Jewish State amongst the individuals within that boundary – the vast majority of whom would not have been Jewish – then one may presume that such a proposal would have been defeated. This is despite the fact that the establishment of a Jewish State would nonetheless have maximised the number of people living in mutually desired association – a desideratum to which Beran explicitly subscribes.

This is not to say that Israel necessarily possesses legitimate sovereignty to the land it now occupies. Indeed, the simple requirement that a group be granted a right to independent Statehood merely because the members of that group desire to associate with one another in a State of their own, fails to address the question of in what territory such a State may be founded. Thus, while the creation of an independent Jewish State in 1948 may well have been justified under the principle of voluntary

political association, it does not follow from this that the founders of Israel had a right to establish a State where they did.[74] The important point, however, remains that while a territorial definition of Statehood means that in order to establish a State a group must first have a territory, it does not follow from this that membership in the group must also be defined by reference to territorial criteria or that such a definition is even consistent with liberal political theory.

In conclusion: if we accept the contemporary territorial delineation of States then any normative theory of secession must address the two questions of who qualifies for a right to secede, and what territory they are entitled to take with them when they secede. Because, however, there is nothing inherent to the LD theory that requires the right-holder to be defined territorially, we can sensibly discuss the former issue without first settling the latter. In other words, issues of territorial sovereignty need not be logically prior to issues pertaining to the determination of the right-holder. Thus, while the ensuing discussion largely ignores issues of territorial sovereignty, this in no way detracts from the usefulness of the discussion nor undermines it. Where the territorial issue *is* finally addressed, however, this must be done in a manner consistent with the underlying theory and how that theory apportions rights to independent Statehood – a test which Beran's right of habitation fails.

4.3 CAN THERE BE SUCH A THING AS A 'LIBERAL' THEORY OF SECESSION?

A. Introduction

For Beran, all individuals have the right to determine their own political relationships – a right which Beran assumes to be both consistent with, and required by, liberal democratic theory. However, to premise a right of secession upon the principle of individual self-determination is to raise fundamental questions about this principle and its justification within liberal political theory. In the ensuing discussion it shall be argued that, whether or not a plebiscitary right to secede may be premised upon such a principle, is dependent upon exactly what form of liberalism is being appealed to: (a)

[74] Particularly in view of the fact that the creation of modern-day Israel included the forceful taking of territory that belonged to others, i.e. the Palestinians.

an account premised upon the prioritisation of certain ideals of equality and individual autonomy; or (b) a form of liberalism in which the overriding consideration is the toleration of dissent. Furthermore, by examining the linkages between the two issues of how liberalism should respond to demands for independent Statehood, and how it should respond to demands by minority groups for special recognition or preferential treatment, it shall be argued that neither of the above two forms of liberalism will yield a theory of secession that approximates the plebiscitary right theory put forward by Beran, Wellman and Gauthier.

Above it was pointed out that typically liberals favour the State as an institution capable of creating an environment in which individuals may more effectively realise the goal of self-authorship, but face a problem in justifying the sort of coercive authority that the State employs to create that environment. However, acknowledging that the State *may* provide an environment which, from a liberal perspective, is superior to that which would obtain in a state of nature is not to say that all existing States do so, or that they do so equally well. Indeed, there are numerous contemporary examples of downright pernicious States that not only fail to assist their citizens in the attainment of the liberal democratic ideal by protecting their rights, but who deliberately violate those rights.[75] Clearly the ideal solution in such cases is the removal of the cause of the injustice either through the reform of the existing government or, where this is not possible, through its removal in favour of a more liberal alternative that *is* prepared to respect and enforce the rights of individuals.[76]

Unfortunately, however, such wholesale reform is, at least in the short to medium term, often impossible. Engaging in forms of action which result in the substantive reform or overthrow of governments requires a degree of effort and coordination amongst a State's citizens. If one is to risk the wrath of an oppressive regime by agitating for political reform then there must be a reasonable probability of successfully achieving it and this (*pace* Miller[77]) requires a degree of certainty, or *trust*, that others will reciprocate by joining in and also standing up to the

[75] e.g. Saddam Hussein's Iraq, Afghanistan under the Taleban, North Korea, Burma/Myanmar etc.

[76] A point also made by Dowding. See Dowding, p.79.

[77] See, for example, Miller (1995), p.91; and 'The Nation-State: A Modest Defence' in *Political Restructuring in Europe. Ethical Perspectives*, ed. Chris Brown (London: Routledge, 1994), p.143.

government.[78] Where this certainty is lacking then the likelihood of ending up as a voice in the wilderness that suffers a rather unfortunate fate for what transpires to be a foolish lack of timidity will, in most cases, direct agents to refrain from attempting to liberalise their rulers.

Furthermore, by intentionally creating an environment of mutual mistrust, suspicion and enmity amongst its subjects, a repressive government may effectively prevent, or at least substantially delay, the development of the mutual trust necessary to overcome such prisoner's dilemmas. Therefore, for this and a variety of other reasons, the removal of illiberal, oppressive regimes may, without outside intervention and assistance, and in some cases even *with* them, be unrealisable in the short to medium term. Given that this is the case then, subject to certain side constraints, we might be prepared to acknowledge a right for a liberal sub-group to secede from an illiberal State providing that their secession would result in the members of that group enjoying an environment which, from a liberal perspective, was superior to that which they left behind in their former State.[79]

In many respects, however, the formulation of a liberal argument for seceding from an illiberal State is *relatively* unproblematic. The real question is what liberal reason might one have for seceding from a State that *does* respect and uphold its citizens' rights to freedom of association and so forth. What *liberal* reasons are there for seceding from one's parent State where that State is a liberal one?[80] In response,

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[78] See, for example, Coleman's discussion of the importance of inter-personal networks of trust in the 1986 campaign of political disobedience in South Korea, and how such networks enabled individuals to effectively organise a campaign of political reform in an environment that was hostile to political freedom. J. Coleman, 'Social Capital in the Creation of Human Capital', *American Journal of Sociology*, Vol.94, 1988, pp.98-118.

[79] An added complication is whether or not a condition of State-perpetrated injustice is particular to a certain sub-group of that State's population. In consideration of a situation where a State is engaged in indiscriminate violations of its citizens' rights, Buchanan claims that while this may give rise to a right of revolution (i.e. a right to overthrow the unjust government and replace it with a just one) it is unclear whether a particular sub-region would have a right to secede and form an independent State. See Buchanan (1991), p.112.

[80] By a 'liberal State' I mean here one which, following Kukathas, "...is not governed by particular common ends or goals but [rather] provides the framework of rights or liberties or duties within which people may pursue their various ends, individually or cooperatively. It is a society governed by law and, as such, is regulated by right principles. These are principles of justice, which do not themselves presuppose the rightness or betterness of any particular way of life." Kukathas, pp.230-31.

Dowding – the only theorist who to my knowledge considers this issue at any length[81] – replies that:

> There may be liberal accounts about when secession is justified, but in the just liberal state there can be no just reason for one group to wish to secede from the whole... The only liberal justification for one portion of a country to secede is social injustice which does not occur in the just liberal state.[82]

Underlying the objection that there can be no liberal reason for seceding from a liberal State is the intuition that, from a liberal point of view, it shouldn't really matter *who* governs us or *what* State we live in, so long as that State is a *liberal* one. The important thing, from a liberal viewpoint, is that individuals are the authors of their own lives and that they have the freedom to acquire knowledge about a range of different life-plans and, where necessary, adjust their current way of life to match these. Assuming that, through the enforcement of the individual rights that these precepts give rise to, the State is capable of enhancing the ability of individuals to live their lives from the inside, why should it matter what State we are governed by provided that that State is a liberal one that fulfils this function?[83]

Of course, this would not be a difficulty if the LD theorist was content to restrict a right of secession to only those groups unfortunate enough to find themselves trapped in an illiberal State. However, LD theorists like Beran *do* argue for a right to secede from liberal States. This is not to say that they do not limit the right to secede to only liberal groups, merely that there is no similar restriction upon the nature of the parent State from which the group wishes to secede. What matters to LD theorists is not the character of the State from which the group wishes to secede but, rather, that a majority of a group favour secession and that their secession would not violate certain

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[81] The issue is also raised briefly by Barry in relation to a Lockean justification of the State. See Barry (1983), p.128.

[82] Dowding, pp.71-72.

[83] See, for example: Dowding who claims that liberalism has no account of the morally correct boundaries of the State but can only suggest how the State should behave once formed (Dowding, p.88); and Caney who claims that we need to distinguish between the questions, 'Who should rule?' and 'How should the rulers govern?' A commitment to liberty, claims Caney, provides an answer only to the latter question (Caney, pp.153-54).

additional side constraints.[84] The difficulty for the LD theorist, then, is to show why, from a liberal perspective, it *does* matter who governs us and, thus, why a group of individuals might have good liberal reasons for seceding from a just liberal State. The purpose of the discussion that follows is twofold: (a) to consider two different, but inter-related, ways of overcoming this difficulty; and (b) to argue that while both of these arguments may well have an element of truth in them, the former will in most cases be insufficient to justify a right of secession while the latter, even if correct, is not germane to the LD theories of secession here under consideration.

B. Kymlicka's Theory of Minority Rights

The first response to the claim that there can be no liberal reason for seceding from a liberal State is based upon an assertion that an individual's ability to live their life from the inside and make choices between alternative conceptions of the good life is, at least to some degree, determined by and dependent upon the character and laws of the (liberal) State within which s/he resides. In other words, because different life plans will require different environments in which to flourish, not all liberal States will be equal in terms of providing an environment in which one may truly be the author of one's own life. Hence, just because one's parent State is a *liberal* State, it does not follow from this that it provides the optimal conditions for one to realise one's life plan and flourish as an individual.

An example of this type of argument is that of Will Kymlicka.[85] It will be remembered from Chapter Two that Kymlicka attempts to make a liberal case for

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[84] See, for example, Boykin who claims that Buchanan is wrong to suggest that secession is an act of *rectificatory* justice – it is rather an act of *procedural* justice. Secessionists, claims Boykin, are not punishing the State nor its citizens, they are merely expressing a preference to govern themselves and *this* is the only significant issue. See Scott Boykin, 'The Ethics of Secession' in *Secession, State and Liberty*, ed. David Gordon (New Brunswick: Transaction Publishers, 1998, p.77.

[85] Before continuing it should be emphasised that Kymlicka's concern is not to justify a right of secession for minority cultures but, rather, to investigate how a liberal case might be made for granting such people special rights that allow them to flourish *within* their existing State. To this end Kymlicka largely ignores the issue of secession and concentrates instead upon less extreme measures for securing the welfare of cultural minorities. On the one hand, then, there is some truth in the claim that by contextualising Kymlicka's analysis within the secession debate, and investigating whether or not it can be used to make a case for a group's secession, Kymlicka's theory is being used in a manner in which he never intended it to be. On the other hand, however, there are important insights to be gained from such an approach. The aim of the discussion that follows is not to say anything of substantive importance about Kymlicka's theory of minority rights or the issues that divide him and his critics. Rather, the more modest goal is

special, group rights by forging a connection between the ability of the individual to achieve the liberal ideal of self-authorship and the policies, institutions and symbolism of that individual's parent State by claiming that freedom of choice has certain cultural pre-conditions.[86] Thus, while a key component of liberalism is the freedom of individuals to choose between alternative life plans, our culture of birth and upbringing[87] – what Kymlicka terms our *societal culture* – not only provides these alternatives, but also makes them meaningful to us.[88]

Moreover, argues Kymlicka, a policy of *common citizenship* – or so-called *benign neglect* – where the State neither opposes the freedom of its citizens to express their cultural allegiances nor nurtures such expression, is flawed because it ignores the fact that the State cannot possibly be culturally neutral.[89] For example, a State must have an official language, official symbols, public holidays, political borders and division of powers and in determining such things there will be no way to avoid favouring a particular societal culture – usually that of the dominant majority.[90] Because the

simply to determine whether or not the various issues contained within the minority rights debate, might be employed to successfully counter the claim that there can be no liberal reason for seceding from a liberal State. This is not to say that some of the issues raised in the following discussion might not be relevant to, and have implications for, Kymlicka's defence of minority rights, only that such considerations will not be directly pursued here.

[86] Clearly other theorists such as Tamir and Margalit and Raz are also relevant here. However, for reasons of brevity the present discussion will concentrate on Kymlicka.

[87] Note that Kymlicka believes that people are *bound* in an important way to their own cultural community, i.e. respecting peoples' own cultural membership and facilitating their transition to another culture are not equally legitimate options. The primary good of cultural membership therefore refers to individual's *own* cultural community. See, for example, Kymlicka (1989), pp.175-77.

[88] Kymlicka (1995), p.83.

[89] Moreover, argues Kymlicka, the analogy between religion and culture is mistaken, as it is quite possible for a state not to have an established church, but in making decisions about the official language and the provision of State services, the government cannot help but give partial establishment to a culture. Kymlicka (1995), pp.108-13.

[90] While Kymlicka has a valid point here (i.e. in deciding things such as official language(s) and public holidays most States favour the cultural identity of the dominant majority) the claim that States cannot be culturally neutral in deciding such things needs to be qualified. Consider, for example, a State in, say, the Middle East populated by two so-called societal cultures: a dominant Muslim community; and a smaller Jewish one. It is conceivable that in determining its official language, holidays, public practices, symbolism and so forth such a State could favour a culture, or set of cultures, that was neutral between its two constituent societal cultures. It might, for example, adopt the Chinese lunar calendar, make Hindi its official language and take Zimbabwe's national holidays as its own. In doing so it would, of course, be favouring the national cultures of China, India and Zimbabwe but it would also, presumably, remain neutral between the cultural communities that make up its own citizenry. While Kymlicka may well reject such a proposal as specious, it is nonetheless a point worth making and is not as hypothetical as one might at first imagine. For example, in many respects the success of English as the global *lingua franca* is a product of its status as a culturally neutral means of communication in ethnically diverse States where the politics of language is a major issue but English (while it may be linked to an educated middle and upper

identity of the dominant societal culture is generally instantiated within the State's official institutions and practices, this gives the majority a head-start in ensuring the continued vitality of their societal culture, while at the same time placing minority societal cultures within that State at a disadvantage.[91] Additionally, because of their relatively few numbers and frequently low level of material wealth, minority societal cultures are in constant danger of being outvoted or outbid on the resources and policies which are essential to the continued flourishing, and in some cases *survival*, of their culture.[92]

Kymlicka's solution to the disadvantage suffered by minority societal cultures is to grant them special, group-specific rights of territorial autonomy (i.e. self-government)[93] and special (political) representation.[94] However, Kymlicka has an extremely restrictive view of what counts as a societal culture. Not only does Kymlicka want to rule out granting special rights to illiberal groups,[95] he also wants to particularise these rights to very specific minority groups which he calls *national minorities* and which primarily include people such as a State's indigenous inhabitants. At the same time, Kymlicka also wants to deny this privileged treatment to other, similar groups such as immigrants, voluntary associations, social movements and lifestyle collectivities.[96] Furthermore, in addition to the question of what types of groups qualify for these special rights, Kymlicka's theory of minority rights is also

class) is not identified with one particular ethno-cultural group. Tamils in the south of India, for example, often express resentment at being forced to learn Hindi in public schools, because they identify Hindi with the people of north India who they see as dominating public and economic life in that country. However, to my knowledge no such resentment is expressed against learning English, which is not only viewed as an educational necessity, but is culturally neutral in the sense that it is not identified with any one ethno-cultural group in India. This indicates that States *may*, at least as far as the variable of language is concerned, be neutral between the various ethnic groups that make up their citizenry.

[91] On this point also see Young who claims that the impartial, general perspective is a myth as people necessarily consider public issues in terms influenced by their situated experience and perception of social relations. Moreover, different social groups have different needs, cultures, histories, experiences and perceptions of social relations which influence their interpretations of the meaning and consequences of policy proposals and the form of their political reasoning. Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', *Ethics*, Vol.99, No.2, 1989, pp.257-58.

[92] Kymlicka (1995), pp.152 and 108-11.

[93] e.g. the re-drawing of boundaries between federal sub-units, devolution of central authority to administrative and political sub-entities such as tribal reservations over matters such as education, health, criminal justice, policing and resource development (Kymlicka (1995), pp.27-30).

[94] See Kymlicka (1995), pp.31-33.

[95] A point to which will be returned to shortly.

[96] See, for example, to Kymlicka's distinction between multiculturalism and poly-ethnicity. See Kymlicka (1995), pp.11ff.

restrictive in the sense that it generally fails to include a right for groups to opt out of their parent State.[97]

There are, then, two questions we need to ask about Kymlicka's theory of minority rights in relation to the question of whether or not there can be a liberal right to secede from a liberal State: (a) how many and what sort of groups will this sort of instrumental approach justify giving special rights to; and (b) will these rights include a right of secession? In the discussion that follows it will be argued that while the ability of all sorts of groups – not just indigenous people – to attain the liberal ideal of self-authorship may be tied to the environment that their State provides,[98] this will rarely be sufficient to justify a right of secession.

C. Particularising Kymlicka's Minority Rights

Kymlicka offers two arguments for why special, group-specific rights should be particularised exclusively to national minorities, the first of which is premised upon the claim that only national minorities qualify as societal cultures.[99] Kymlicka defines a societal culture as one which: (a) provides its members with meaningful ways of life across a range of human activities (e.g. educational, social, economic and religious); (b) tends to be territory specific and based upon a common language; and (c) is comprised of common institutions and practices.[100] Immigrant groups – unlike, say, indigenous peoples – do *not* qualify as societal cultures because: (a) they do not occupy homelands; (b) they manifest their distinctiveness primarily in their family lives and voluntary associations; and (c) they participate within the public institutions of the

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[97] On the various types of group-specific rights see Jacob, T. Levy, 'Classifying Cultural Rights' in *Nomos 39. Ethnicity and Group Rights*, ed. Ian Shapiro and Will Kymlicka (New York: New York University Press, 1997). While Kymlicka *does* concede that liberalism might support a restricted right of liberal groups to secede from their parent State, he quite correctly points out that for a variety of reasons this will not be an option available to many minorities. For this reason he prefers to concentrate on less extreme measures for securing the welfare of minority cultures (Kymlicka (1995), p.186).

[98] i.e. some liberal States will provide an environment more conducive to the effective realisation of a group's life plans than other liberal States.

[99] Kymlicka writes: "[w]hat matters, from a liberal point of view, is that people have access to a societal culture which provides them with meaningful options encompassing the range of human activities and, for the most part, national minorities have societal cultures and these other types of groups do not." Kymlicka (1995), p.101.

[100] See Kymlicka (1995), pp.76ff.

dominant culture(s) and speak the dominant language(s).[101] Similarly, life-style groups, voluntary associations and social movements also do not qualify as societal cultures because they are not "...distinct and potentially self-governing societies incorporated into a larger state."[102]

The second way in which Kymlicka attempts to particularise his special rights is by employing a *criterion of voluntariness*, and claiming that immigrants[103] are distinct from indigenous peoples because immigrants uproot themselves *voluntarily* in full knowledge of the fact that, upon arrival in their new land, they will have to adapt to new customs and, of course, a foreign language. Conversely, indigenous people have historically had very little say in such matters and, for the most part, have been forcibly incorporated into a wider society dominated by a foreign societal culture through a process of often violent colonisation over which they exercised little, if any, control.[104]

Other theorists – most notably Kukathas – have cast aspersions upon these two methods of picking out candidates for special rights. Kukathas points out that not only will some national minorities fail to qualify as societal cultures, but other types of groups which Kymlicka wants to exclude as candidates for special rights, will have more of a societal culture than some national minorities which Kymlicka claims *should*

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[101] This is not to say that immigrant groups might not assert a right to publicly express their ethnic particularity, merely that they usually wish to do so *within* the institutions of the larger society of which they are apart, whereas indigenous peoples typically want to set up a parallel society in the form of a separate, self-governing nation (Kymlicka (1995), pp.14-15 and pp.77-79).

[102] Kymlicka acknowledges that while we may use the term 'culture' in a non-ethnic sense (e.g. a gay or bureaucratic culture), he is more concerned with national and ethnic differences, and so uses the term in a relatively restrictive sense. While Kymlicka admits that this is simply his stipulative definition of culture, he believes that it nonetheless corresponds to a common usage of the term. See Kymlicka (1995), pp.18-20.

[103] Which Kymlicka refers to as *an ethnic group*, as opposed to indigenous peoples who are a *national minority*.

[104] Kymlicka (1995), pp.95-96 and (1989), pp.186-89. Kymlicka believes that, while there may be some 'hard cases' (e.g. African-Americans who were brought to the US involuntarily as slaves and then prevented from integrating into the institutions of the majority culture, and the Hutterites of Canada who came voluntarily on the understanding that they would be permitted to establish a separate, self-governing society), most groups will nonetheless slot fairly neatly into either the category of involuntary national minority or voluntary ethnic group. In support of this claim Kymlicka cites Ted Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflict* (Washington DC: Institute of Peace Press, 1993), p.15. Although, as Kukathas points out, even Gurr acknowledges that there are limits to such a distinction. See Kymlicka (1995), pp.24-25; Chandran Kukathas, 'Multiculturalism as Fairness: Will Kymlicka's Multicultural Citizenship', *Journal of Political Philosophy*, Vol. 5, No.4, 1997, p.415; and Gurr, p.15.

be entitled to such preferential treatment.[105] Similarly, with respect to the criterion of voluntariness Kukathas notes that: (a) cultural minorities such as indigenous peoples are *not* the only individuals who face inequalities which are not the product of their free choices;[106] (b) not all members of cultural minorities will be equally disadvantaged and some may be better off than most members of the majority cultural group;[107] (c) not all migrants come voluntarily to their new homeland (e.g. some come as refugees fleeing persecution, whereas others are driven by economic imperatives and come in search of a better standard of living);[108] and (d) not *all* indigenous people are involuntary members of minority societal cultures (e.g. those who are of mixed descent or who have become urbanised have the choice of exiting their aboriginal communities to enter the wider society at relatively low cost).[109]

D. Justifying a Right to Secede From a Liberal State

Earlier it was noted that while liberalism is based upon an individualistic moral ontology, this does not mean that liberals do not value cooperative effort and the collective institutions that it creates. Rather, liberals view such associations as possessing only an instrumental value commensurate to the contribution that they make towards the well-being of their individual members. Indeed, few people – liberals included – would deny that at least *some* minimal level of inter-personal

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[105] e.g. see Kukathas's discussion of Malaysian Chinese who, despite being an immigrant people, have more of a societal culture than a tribe of Australian aborigines known as the Ngarrindjeri (Kukathas (1997), p.415).

[106] e.g. anyone born physically or mentally handicapped could also make this claim as could anyone born into poverty.

[107] Kukathas (1995), p.245.

[108] In fact Kymlicka concedes that not all migrants come voluntarily to their new State – e.g. refugees fleeing persecution, and those in search of a better standard of living – but nonetheless denies that such people should be afforded the same rights as national minorities (Kymlicka (1995), pp.98-101).

[109] See Kukathas (1997), pp.412-13. In illustration of this point Kukathas again cites the example of the Ngarrindjeri people of South Australia who are all of mixed (European and Aboriginal) descent, have been raised in the traditions of Christianity and Australian capitalism and who know less about their group's traditions than white anthropologists do. This in turn raises another difficulty with Kymlicka's theory of minority rights: given that there are some individuals who will have a choice regarding their cultural membership, then granting special rights to members of indigenous cultures that are denied to members of the wider society effectively provides an incentive for such individuals to opt for the aboriginal identity. Thus, we need to ask to what degree such rights protect the legitimate interests of *pre-existing* cultural minorities, and to what degree they in fact contribute to the creation of such groups by providing an incentive for people to identify as members of minority cultures by artificially rigging the consequences of their decision to do so. On this point also see Kukathas (1995), pp.232-34; and Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985), pp.66-67.

cooperation is necessary if individuals are to flourish. While we may question, as the communitarian does, whether or not liberalism's rational instrumentality attaches *adequate* importance to man's social nature and collective institutions and practices, there is nonetheless generally no disagreement over the fact that man *is*, by nature, a social creature. Moreover, it is also clear that social cooperation for mutual advantage is a practical necessity if individuals are to realise sufficient levels of material well-being, freedom and security which are themselves pre-requisites to each individual fulfilling his/her desires and potential and, thus, realising the liberal ideal of genuine self-authorship.

However, while inter-personal cooperation for social advantage is clearly of undeniable benefit to individuals in their pursuit of what gives meaning to their life, and may itself be a constituent component of one's conception of the good life, it also presupposes a certain degree of inter-personal coordination. Given that natural, spontaneous social harmony will generally prove elusive then, to avoid sliding into a sub-optimal – even Hobbesian – state of affairs, individuals must regulate their actions in accordance with certain binding rules and create an agency (i.e. a State) to administer and enforce these rules. By prohibiting certain actions and making others mandatory, these rules specify what each individual is free to do and not to do in pursuit of their life plan, and so provide a general framework within which individuals may peacefully resolve disagreements and conflicts of interest in a manner which minimises social disruption, while at the same time striving to live their lives according to the values which give meaning to it.[110] Not only do these rules constitute an instrumentally effective means of promoting the value of individual freedom by providing the conditions necessary for each individual member of that society to achieve their goals, they also determine each individual's rights and duties towards one another and the distribution of the benefits and burdens made possible by their cooperation.

[110] Also see De George's orchestra analogy where he claims that an orchestra requires a conductor and "...each individual musician accepts limits of his freedom to play as he wishes in order that all may play effectively together." Richard De George, *The Nature and Limits of Authority* (Lawrence: University Press of Kansas, 1985), p.120.

On the one hand, then, it is clear that individuals have a mutual interest in cooperating to create an environment in which each can more effectively attain the liberal ideal of living their lives according to a plan of their own design. On the other hand, however, it is also clear that each individual's divergent needs, desires, values and conceptions of the good life[111] will, to varying degrees, conflict with those of their fellow citizens. Bearing in mind the limited nature of natural and social resources, and also that individuals begin life with different natural endowments and means for satisfying their wants and achieving their ends, it will be practically – not to mention *logically* – impossible to design mutually binding rules of social conduct that are optimal from every individual's point of view. Whereas a set of rules may be advantageous to some individuals in their pursuit of their own, idiosyncratic conception of the public good, other individuals will be disadvantaged – some more so than others.[112]

This is true, not only for the narrow range of groups which Kymlicka terms cultural minorities and to which he wants to grant special rights, but for all manner of individuals with different life plans. For example, feminists such as Okin note that while (*pace* Kymlicka) the institutions of (liberal) States tend to reflect the cultural ethos of the dominant societal culture, most cultures – particularly minority, non-Western cultures of the type that Kymlicka wants to preserve – tend to be patriarchal and gendered in an unfair way that uses the male as *the norm*.[113] Indeed, many minority cultures instantiate discriminatory practices against women of the sort that not only severely restrict their freedom of choice, but also threaten their well-being and even their lives.[114] Consequently, not only may the female members of a minority culture have no interest in the preservation of their culture, they may actually be better off if it were to become extinct so that they might then be integrated into a less-sexist *surrounding culture*.[115] Okin concludes that because this discrimination against

[111] i.e. their life plan, or *conception of the public good*.

[112] See, for example, Richard Allen Rodewald, *Liberalism and the Problem of Justifying the State*, Ph.D Dissertation, University of California, Los Angeles, 1978, pp.5-7.

[113] See, for example, Susan Moller Okin, 'Is Multiculturalism Bad for Women?' in *Is Multiculturalism Bad for Women?*, ed. Joshua Cohen, Matthew Howard and Martha C. Nussbaum (Princeton: Princeton University Press, 1999).

[114] e.g. practices of clitoridectomy, coerced marriages, polygamous marriages and systems of property rights that make women financially dependent upon their husband and his family, and which also bring female sexuality and reproductive capacities under male control.

[115] Okin, pp.22-23. While it is true that Kymlicka rules out groups who discriminate formally and overtly

women frequently has very powerful cultural roots and is often informal and private, granting minority cultures the special rights which Kymlicka proposes will not only fail to address the subjugation of women but may actually perpetuate or exacerbate it.

Kymlicka, however, sees multiculturalism and feminism as allies and claims that the concerns raised by Okin are simply further evidence that liberalism's strict adherence to a thesis of moral egalitarianism needs to be abandoned.[116] Just as liberal theorists have implicitly or explicitly laboured under the misapprehension that citizens share the same language and national culture, they have also overlooked gender differences and operated under the assumption that the citizen is a man.[117] Thus, while liberals have neglected to ask what sorts of principles or institutions would be favoured by women, they have also failed to ask the same question with respect to ethno-cultural minorities with the result that both groups have had their distinctive needs and interests disregarded. Moreover, claims Kymlicka, both feminists and multiculturalists look to the same remedy of special group rights. Just as justice between ethno-cultural groups cannot be achieved simply by granting national minorities the same rights as the majority; so women's equality with men cannot be achieved by giving them the same set of individual rights as men.

Kymlicka's argument for special rights for minority cultures – at least as I understand it – is concerned with the cultural *pre*-conditions of individual choice, i.e. it is restricted to considerations that are *anterior* to an individual's selection of a life plan. The idea is that because individual freedom of choice *pre*-supposes certain cultural structures, before individuals can decide between different ways of living their life they need to have a set of alternative life plans from which they may choose and which have

against women (refer Kymlicka (1995), p.153 and 165) Okin claims that this misses the point. In many cultures a woman's basic civil rights and liberties are formally assured, yet women still suffer because discrimination against them is enforced informally in the private sphere within, say, family structures. Indeed, argues Okin, no culture in the world today – whether minority or majority – could pass a test of 'no sex discrimination.' See Okin, p.22.

[116] Kymlicka writes: "I see multiculturalism and feminism as allies engaged in related struggles for a more inclusive conception of justice. Indeed, my own thoughts on ethnocultural justice have been deeply influenced by Okin's work on gender justice, since I think there are many comparable historical patterns and contemporary lessons." See Will Kymlicka, 'Liberal Complacencies. in *Is Multiculturalism Bad for Women?*, ed. Joshua Cohen, Matthew Howard and Martha C. Nussbaum (Princeton: Princeton University Press, 1999), p.34.

[117] Kymlicka (1999), p.33.

meaning to them, and for this they will look to their societal culture.[118] However, because minority societal cultures are disadvantaged in terms of securing conditions favourable to their continued flourishing and survival, their members require special rights and entitlements not enjoyed by members of the majority culture.

If, however, Kymlicka is going to support extending these special rights to groups *other* than (minority) societal cultures then this must mean one of two things: either (a) membership of a flourishing societal culture is *not* the only determinant of freedom of choice;[119] or (b) *within* societal cultures there are certain inequalities that restrict individual freedom of choice, and in order to eliminate these we need to grant the aggrieved party the same, special rights which Kymlicka claims minority cultures should possess. Both Okin and Kymlicka appear to prefer the latter view:

> ...surely self-respect and self-esteem require more than simple membership in a viable culture. Surely it is *not* enough, for one to be able to "question one's inherited social roles" and to have the capacity to make choices about the life one wants to lead, that one's culture be protected. At least as important to the development of self-respect and self-esteem is *our place within our culture*. And at least as pertinent to our capacity to question our social roles is *whether our culture instills in us and forces on us particular social roles*.[120]

Suppose we accept the claim that the structure of State institutions and practices has tended to embody a mono-cultural, mono-linguistic norm that is male-centric and, thus, biased against women. It is equally true that this norm has also tended to be, for example, both heterosexual and able-bodied and, thus, biased against homosexuals and the disabled. Therefore, even if we accept Kymlicka's claim that liberals have typically neglected to ask what sorts of principles or institutions would be favoured by

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[118] To emphasise: membership in a secure, flourishing societal culture is a prerequisite to the capacity of making choices about how to live one's life.

[119] i.e. there are other factors which also determine an individual's ability to choose between different life plans that have meaning to them and gender is one of these.

[120] Okin, p.22. Elsewhere Okin similarly states that: "Those who make liberal arguments for the rights of groups, then, must take special care to consider inequalities between the sexes, since they are likely to be less public, and thus less easily discernible. Moreover policies designed to respond to the needs and claims of cultural minority groups must take seriously the urgency of adequately representing less powerful members of such groups." See Okin, p.23. Kymlicka, on the other hand, notes that "I agree with the basic claim of Okin's paper – that a liberal egalitarian (and feminist) approach to multiculturalism must look carefully at intra-group inequalities, and specifically at gender inequalities, when examining the legitimacy of minority group rights. Justice within ethnocultural groups is as important as justice between ethnocultural groups." Refer Kymlicka (1999), p.31.

women and members of ethno-cultural minorities,[121] the same is true of any number of other variables; not just gender and culture. So if we are going to grant special rights to women and cultural minorities, why not also grant them to gays, lesbians, the disabled and, indeed, *any* marginalised group whose identity is not represented within, and promulgated by, their State's official institutions and practices? As Kymlicka admits, this same sort of claim for special rights can be, and *has* been, made by all sorts of marginalised groups.[122]

Here, again, we run into the problem raised by Kukathas of how to pick out properties which particularise special rights only to that narrow range of groups to which Kymlicka wants to grant such rights. If we are going to support granting women special, group-specific rights for the reasons listed above then presumably we must also grant the same rights to groups such as homosexuals and the disabled. The important issue, however, is whether or not such considerations might be effectively employed to counter the claim that there can be no liberal reason for seceding from a liberal State. Suppose, then, that we accept that both between *and* within different cultural groups there will be a range of divergent conceptions of the good life competing for public recognition and support. Bearing in mind the scarcity of resources and the mutually exclusive nature of some of these conceptions, it is clear that the State cannot fully satisfy the competing demands of all the various groups that make up its citizenry. Thus, perhaps a group of people who share a common life plan but whose State, for whatever reason(s), is unable to offer the understanding and sustenance that that group desires, might be better off in a State of their own whose formal institutions, policies and practices reflect their common beliefs and values while giving succour to them.

Homosexuals, for example, may flourish to a greater degree in a State whose policies, institutions and symbolism instantiate and reflect the values and priorities that together

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[121] See Kymlicka (1999), pp.32-33.

[122] See Kymlicka (1999), pp.33-34. In this context it is instructive to refer to Kukathas's discussion of 'liberal equality' with respect to 'basic' and 'derivative' rights. Refer Chandran Kukathas, 'Cultural Rights Again: A Rejoinder to Kymlicka', *Political Theory*, Vol.20, No.4, 1992, pp.675-76. Also note that Kymlicka *cannot* appeal to the criterion of voluntariness to exclude such groups from consideration for special rights because, just as one may have no choice about being a member of a so-called national minority, so no one has a choice about being a woman, being disabled or (according to those theorists who subscribe to a thesis of *biological determinism*) being homosexual.

constitute a homosexual-centric conception of the public good. Such a State might promote homosexual-specific needs and interests by, for example, recognising marriages between homosexuals, funnelling extra money towards AIDS research and prevention, educating people about the evils of homophobia while attaching more rigorous penalties to acts of discrimination against homosexuals, and so forth. Conservative Catholics, on the other hand, may do quite well for themselves in a secular State, however they may nonetheless find it easier to flourish in a State which, while being liberal, nonetheless encourages religiosity, discourages sexual promiscuity (not to mention birth control and homosexuality) and promulgates the Church's symbolism and teachings through its institutions, policies and symbols. Indeed, the same could be said of almost *any* type of group which has its own identity and whose identity-specific needs and interests are a constituent component of its members' conception of the good life. Even the disabled might find it easier to flourish in a disabled-centric State with, for example, more wheelchair ramps, a fully government subsidised health system and rehabilitation network and so forth.

Are such considerations sufficient to provide a liberal justification for a group's secession from a liberal State? On the one hand, groups such as, say, homosexuals may benefit if their specific needs and interests were more adequately addressed by changes in public policy of the sort mentioned above. On the other hand, however, this does not mean that the creation of a gay and lesbian State would be an instrumentally effective, nor the *most* instrumentally effective, means of achieving such an outcome. Not only does secession usually come with high attendant costs, but there may be other, less extreme means of furthering the ability of a group's members to achieve the liberal goal of self-authorship which may, *or may not*, include group-specific rights of the type proposed by Kymlicka.

Indeed, it is a matter of little dispute that there are more groups in the world, with their own group-specific interests around which their members' conception of the good life is formed, than there are possible States. As Kymlicka notes, while there is no reason to suppose that liberals should necessarily oppose peaceful secessions by liberal groups, for many groups the option of secession is not always possible or desirable.[123]

[123] e.g. many groups – particularly indigenous peoples who are frequently relatively small in number and

Thus, even where a group's secession *were* feasible, the costs of such a move – particularly when it involves the setting up of a new, independent State rather than simply joining a neighbouring State – may nonetheless prove to be prohibitively high.

E. Two Divergent Accounts of Liberalism & Illiberalism

The second argument for why a group might have a liberal reason to secede from a liberal State concerns a situation where a group of individuals does not subscribe to liberalism, are themselves rather illiberal in their beliefs and practices, and so want to secede in order to create an illiberal State.[124] The argument trades on the question of just how much illiberalism liberalism can allow and, like the analysis above, finds expression in the debate between Kymlicka and Kukathas. The purpose of the brief discussion that follows is to briefly outline the dispute between these two theorists and, in addition to then making some general remarks about it, demonstrate that even if we accept the claim that liberalism includes the freedom to establish an illiberal community, this type of argument is not really germane to the LD theories of secession here under consideration.

In his defence of minority rights Kymlicka makes a distinction between two different types of claim which a group may make: (a) a claim against its own members; and (b) a claim against the larger society of which the group is a constituent component. The former type of claim – which Kymlicka terms *internal restrictions* – are designed to protect a group from the effects of internal dissent[125] in the name of group solidarity and cultural tradition or integrity. Kymlicka claims that because they restrict the very value which liberalism seeks to promote – i.e. individual choice – internal restrictions are rarely justifiable from a liberal perspective.[126] For example, Kymlicka argues against Lord Devlin's rejection of the legalisation of homosexual practices on the grounds that doing so would change England's cultural structure. Protecting the homophobic character of England's cultural structure from the effects of allowing free choice of sexual life-style, claims Kymlicka, undermines the very reason we have to

materially disadvantaged – would have enormous difficulty forming a viable, independent State. Kymlicka (1995), p.186.

[124] Or, alternatively, to join an existing illiberal State

[125] i.e. a refusal by individuals to follow traditional practices or customs.

protect England's cultural structure in the first place (i.e. to allow meaningful individual choice).[127]

Conversely, Kymlicka believes that the latter type of claim – which he terms *external protections* – may be justified from a liberal standpoint, provided they reduce the minority group's vulnerability to the decisions of the larger society and do not enable one group to exploit or oppress other groups. In summary: liberalism requires *freedom within* the minority group and *equality between* the minority and the majority groups.[128] Special, group-specific rights are, therefore, permissible if they help promote justice *between* ethno-cultural groups, but are impermissible if they produce, perpetuate or exacerbate inequalities *within* groups.[129]

Once again, however, Kukathas has challenged this view by pointing out that many cultural minorities of the sort that Kymlicka wants to grant special rights to are, in many respects, fundamentally *il*liberal. Not only do these groups place very little value upon individual freedom of choice, but they also subordinate the interests of the individual to those of the community.[130] Such groups would, presumably, not only have no interest in a system of minority rights that challenged their illiberal practices, but would reject it out of a concern that it would imply the reorganisation of their community's structure in accordance with liberal precepts of democracy and individual rights.

This tension between respecting cultural differences and upholding certain individual rights leads Kukathas to conclude that there are, in fact, two different and inconsonant views of liberalism and what a liberal society is. For Kymlicka, a liberal society is one which is comprised of 'liberal' communities – i.e. communities which uphold certain ideals of equality and individual autonomy of the sort associated with Kant, Mill and Rawls. On this understanding a way of life is legitimate if it values individual

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[126] Kymlicka (1995), pp.35-36 and p.152.

[127] Kymlicka (1989), pp.171-72. Also see Kymlicka's discussion of the Pueblo Indians. Kymlicka (1989), p.196.

[128] Kymlicka (1995), pp.35-36 and p.152.

[129] Refer Kymlicka (1999), p.31.

[130] Kukathas (1995), pp.241-42.

autonomy and, thus, individuals possess certain civil rights that override, or 'trump', other, opposing considerations. Conversely, for Kukathas a liberal society is distinguished by its toleration of dissent and therefore *may* contain 'illiberal' communities that place very little value upon individual equality and autonomy, and which subordinate the interests of the individual to those of the community.[131] Under this version of liberalism a way of life is legitimate if the individuals taking part in it do so willingly and, thus, have a right of exit that takes precedence over all other rights.[132] In summary: for Kymlicka individuals have certain antecedent freedoms which generate a set of enforceable moral claims against the wider community; for Kukathas individuals have only the freedoms allowed them by the community of which they are a member, and the only enforceable claim individuals can make against that community is to be permitted to leave.[133]

To interfere in illiberal communities in an attempt to liberalise them would, from Kukathas's perspective, express an intolerance of dissent and, thus, be illiberal. Rather, "...different communities in a liberal order should be able to go their own moral ways [regardless of their attitudes towards the values of equality and individual autonomy]."[134] On the other hand, however, Kukathas believes that adherence to Kymlicka's model of liberalism *necessarily* entails a commitment of interference in such groups, as if we embrace the values of autonomy and individuality and the substantive civil rights that they give rise to, then we should also enforce that view upon those communities that do not subscribe to it[135] – a process which will, at least in most cases, paradoxically lead to that culture's destruction.[136] For this reason, Kukathas objects that Kymlicka's theory entrenches cultural rights "...on a basis which

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131 Kukathas (1992), p.680.

132 See Kukathas (1995), pp.248-49.

133 See also Jeremy Shearmur, *The Political Thought of Karl Popper* (London: Routlege, 1996), pp.143ff. Shearmur compares this approach with that of Nozick (see above) and Karl Menger, *Morality, Decision and Social Organization: Toward a Logic of Ethics* (Dordrecht and Boston: Reidel, 1974).

134 Kukathas (1997), p.425.

135 See Kukathas (1997), p.425.

136 Kukathas explains: "If their culture is not already liberal, if it does not prize individuality or individual choice, then to talk of liberalization is inescapably to talk of undermining their culture. Culture is not simply a matter of colorful dances and rituals, nor is it even a framework of context for individual choice. Rather, it is the product of the association of individuals over time, which in turn shapes individual commitments and gives meaning to individual lives – lives for which individual choice or autonomy may be quite valueless. To try to reshape it in accordance with ideals of individual choice is to

itself undermines many forms of cultural community, specifically those that fail in their practices to conform to liberal norms of tolerance and to honour the liberal ideal of autonomy."[137]

Suppose that we accept Kukathas's version of liberalism in which the members of an association are free to determine the terms of their association. How might such a view be employed to successfully counter the claim that there can be no liberal reason for seceding form a liberal State? We might, for example, begin by imagining a group which adheres to certain beliefs and practices that do not value equality and individual autonomy, and which subordinates the needs and interests of its individual members to those of the larger group. Imagine, further, that this group exists as a minority in a larger State, the majority of whose members *do* value equality and individual autonomy, and who dominate public life with the result that their conception and prioritisation of individual rights and autonomy are generally reflected within the State's official institutions and practices.

The smaller group might then base a right to secede on the claim that the welfare and survival of the collectivist, group-orientated beliefs and practices to which they adhere requires that they be afforded the degree of control over their own affairs that only independent Statehood can offer. In as much as the right to secede is justified by reference to the disadvantage and vulnerability suffered by a group as a result of its minority status, such an argument is similar to that which Kymlicka makes in favour of special rights for minority societal cultures. Kymlicka would, however, reject the argument because, rather than bestowing rights with the aim of increasing the total sum of individual freedom of choice, it does exactly the opposite by according a right of independent Statehood for the sake of preserving a way of life that places little, if any, value upon individual freedom of choice.[138]

strike at its very core." See Kukathas (1995), pp.243-44.

[137] Kukathas (1995), p.244. Also see Yael Tamir, 'Who Do You Trust?' in *Is Multiculturalism Bad for Women?*, ed. Joshua Cohen, Matthew Howard and Martha C. Nussbaum (Princeton: Princeton University Press, 1999).

[138] Moreover, such an argument also differs from that of Kymlicka in the sense that Kymlicka is concerned with rights that allow cultural minorities to flourish *within* their existing State.

Moreover, it is clear that even if we accept the right of groups to determine the terms of their own association, this will nonetheless be insufficient to rescue the LD theorist from the claim that there can be no liberal reason for seceding from a liberal State. There may, for example, be less extreme measures than secession which do not come with the high price tag of setting up an independent State, but which *are* sufficient to preserve an illiberal minority's way of life from being undermined by their more autonomy-minded neighbours. We might exempt members of the group from certain laws which govern the other citizens of the State, e.g. laws regarding bigamy might be made inapplicable to the group's members, thus allowing for polygamous marriages. Similar exemptions might be made with respect to laws regarding bodily integrity – thus allowing certain practices such as, say, clitoridectomy which would otherwise be illegal. The group might also be granted its own territory, or 'reservation', and given the right to restrict entry to that territory (particularly with respect to non-members) and to enforce its own rules within that territory.

The issue, however, is *not* whether illiberal practices can be adequately protected in a larger, liberal State by less extreme measures than secession. Rather, the issue is that the whole question of whether or not there can be a liberal reason for seceding from a liberal State, only makes sense if we are operating under the assumption that a liberal society is one which is comprised of so-called liberal communities that emphasise the values of individual autonomy and equality. If, however, a liberal society may be comprised of *il*liberal communities that do not place any emphasis upon individual autonomy and equality, then the claim that there can be no right to secede from a liberal State simply will not hold. After all, if a society is prepared to tolerate an illiberal community in their midst that engages in practices of discrimination against their own members and so forth, then why wouldn't the society also be prepared to let that community secede?

If we adopt a Rawlsian conception of liberalism like that preferred by Kymlicka then the case for secession must be substantially weakened. Under this account any right to secede must necessarily be cashed out in terms of an increase in the ability of individuals to live their life from the inside (i.e. much in the same way as Kymlicka attempts to justify special rights for minority cultures by demonstrating a link between

cultural membership and individual choice). With this version of liberalism it is difficult to see how a group might possess a right to secede from a liberal State that respects and upholds the individual rights, to which this conception of liberalism gives rise. Even if a sub-group's life plan *does* differ substantially from that of the majority, there may be less extreme measures than secession which satisfactorily address such considerations and allow the members of the minority to live their lives according to that life plan.

If, on the other hand, we adopt the type of liberalism favoured by theorists such as Kukathas, then the most important thing is that, as a liberal society, we tolerate dissent and do not impose our views upon others. This means, first, that a right to secede no longer needs to be explicated in terms of individual autonomy and an increased ability to live one's life from the inside. Second, it also means that where a sub-group wants to secede, then to deny that group the right to secede and maintain the political union by force is to fail to tolerate that group's expression of (political) dissent which, by definition, is an illiberal act. Under the former type of liberalism, a group has to justify its desire to secede by demonstrating an instrumental connection between independent Statehood and the ability of individuals to achieve genuine self-authorship. Conversely, under the latter type of liberalism, the expression of a desire to secede as an act of dissent to the political *status quo* is itself sufficient to ground a *prima facie* right to secede.

Therefore whether or not there can be a liberal right to secede from a liberal State depends upon exactly what type of liberalism we are working with and, thus, what we understand a liberal State to be. If we adopt the type of liberalism favoured by Kukathas then the objection that there can be no liberal reason for seceding from a liberal State would appear to be irrelevant. Yet, at least in the case of Beran's theory, it is evident that this is *not* the type of liberalism to which the LD theory appeals. Indeed, Beran specifically rules out the possibility of a group seceding to create an illiberal State by claiming that in order to possess a right to secede, not only must the seceding group be prepared to allow sub-groups to secede (providing that they too fulfil all the requisite criteria and so qualify for a right to secede), but they must not intend to oppress or exploit a subgroup for whom secession is not an available

option.[139] Hence, the right to secede in order to establish an illiberal State is a right that is simply not countenanced by Beran.

> ...in real world theory it has to be granted, and indeed stressed, that a community's right of secession, if exercised in order to oppress minorities in its midst, may be overridden by the right of these minorities not to be oppressed.[140]

In the case of the other two theorists who fit into the same broad category as Beran – Gauthier and Wellman – things are not so clear cut. However, there is nonetheless *some* reason to believe that they would not favour the type of liberalism propounded by Kukathas. The emphasis that Gauthier places upon the right of individuals to associate politically with those who also wish to associate with them, indicates that he believes that any State established by a group's secession must allow a sub-group the right to also secede if it so wishes. However, aside from a right of exit, it is not entirely clear what additional restraints Gauthier favours placing upon would-be secessionists – including the question of whether or not a group must place adequate emphasis upon the values of individual equality and autonomy if they are to possess a right to secede. Note, however, Gauthier's concern for the Anglophone minority that would be created by the secession of Quebec, but for whom secession would not really be a feasible option. While Gauthier draws no firm conclusions from this discussion, at the very least it does indicate a belief by Gauthier that the post secession welfare of minority groups within a State created by secession is not entirely irrelevant to the determination of whether or not a group's secession would be legitimate.[141]

Finally, Wellman argues that a group has a right to secede if: (a) the group's members wish to secede; and (b) their secession would not create 'harmful conditions.' While Wellman, like Gauthier, never explicitly addresses the question of whether or not the right to secede includes the right to establish an illiberal State, there are good reasons to suppose that he would not be supportive of such a proposition. The 'harmful conditions' which Wellman believes would justify withholding a right of secession refer to situations in which "...either the seceding region or the remainder state is

[139] See Beran (1984), p.30.
[140] Beran (1998), p.54.

unable to perform its political function of *protecting rights...*"[142] The fact that Wellman rejects an individual right of unilateral secession because he believes it would produce infringements of individual property rights,[143] indicates a belief that the rights which a State must protect includes more than just a simple right of exit.

Therefore, while both Gauthier and Wellman do not explicitly reject the right of a group to secede and create an illiberal State that does not emphasise individual equality and autonomy – as, say, Beran does – there is nonetheless good reason to suppose that they also would not be supportive of such a proposal. Suppose, then, that we allow that the type of liberalism favoured by Kukathas is capable of satisfactorily dealing with the objection that there can be no reason for seceding from a liberal State. The apparent hostility of these three LD theorists to the notion that a group may permissibly secede to create an illiberal State – i.e. a State in which the only enforceable moral claim that people have against their rulers is to be allowed to exit – indicates that they would reject the form of liberalism favoured by Kukathas. Thus, even if Kukathas's liberalism *does* provide an effective counter to the claim that there can be no reason for seceding from a liberal State, such a counter-argument is apparently not pertinent to the LD theorists here under consideration.

It seems, then, that LD theorists such as Beran are in something of a bind. If, on the one hand, they stick with the type of liberalism favoured by Kymlicka then, in all but the most extreme cases, the right to secede must be limited to those groups unfortunate enough to find themselves trapped in an illiberal State with no immediate prospect of achieving liberal reform. If, on the other hand, the LD theorist opts for the model of liberalism favoured by Kukathas then, while this will allow for a right to secede from liberal States, it will also sanction the creation of States which do not value individual autonomy and equality. Do we: (a) allow a plebiscitary right of secession based upon simple majoritarian considerations of the type favoured by theorists such as Beran – but which also includes the right to establish an illiberal State in which the only enforceable claim which individuals have against the wider community is to be

[141] See Gauthier, p.370.

[142] Wellman, p.161 [emphasis added].

[143] Wellman believes that an individual right of secession would produce a breakdown of law and order creating a state of affairs resembling a Hobbesian state of nature (Wellman, p.156).

permitted to leave – or; (b) do we restrict the right to secede to those groups prepared to respect and uphold individual rights of autonomy and equality and in doing so acknowledge that the right to secede will apply to relatively few groups over time? Unfortunately, as Kukathas puts it, "...one cannot have it both ways."[144]

4.4 CONCLUSION

If the LD theory of secession is defined simply as one which endorses a plebiscitary right of secession then this raises numerous, inter-related issues regarding territory and the determination of the right-holder. Above it was argued that one account which aims to resolve these issues – that of Beran – should, from a liberal perspective, be rejected as unsatisfactory. However, even if a satisfactory account of these various issues *is* forthcoming, there will remain the additional, often neglected, question of how liberalism justifies a right for individuals to determine their own political relationships and precisely *why* a group of liberal individuals might want to secede from a liberal State.

Above two possible responses to this question were considered and found wanting. The first response – that an individual's ability to realise their life plan will, at least to some degree, be dependent upon the character and identity of the official institutions and practices of the State within which that individual finds him/herself – is inadequate because less extreme measures than secession will usually be sufficient to satisfy such considerations. The second response – that individuals cannot adequately realise illiberal ways of life in a liberal State and should be free to establish such States if they so wish – is not really germane to the type of LD theory under consideration here and would, in any case, presumably be rejected by LD theorists as it is by Beran.

There may, of course, be other, more satisfactory responses that *do* demonstrate a liberal reason for seceding from a liberal State, however it remains entirely mysterious as to what these might be. In the absence of any such account it would seem that, if (pace *Beran*) we rule out the creation of illiberal States that do not uphold ideals of

[144] Kukathas (1992), p.678.

individual autonomy and equality, then any LD right to secede must be restricted to those groups unfortunate enough to find themselves trapped within illiberal States. This does not mean that liberals may not be able to produce pragmatic accounts of when secession should be allowed, only that such accounts are not specifically liberal and must be viewed as "...'second best' solutions outside of, though not necessarily inconsistent with, a general liberal account of the just state."[145]

Consider, for example, a situation where two groups which share a history of mutual antagonism, mistrust and violence inhabit the same State and are engaged in a seemingly endless campaign of serious abuse against one another. Suppose, further, that the members of these two groups are incapable of putting their differences aside, and that a political division where each group has its own State would allow their members to get on with living their lives in accordance with the values of their choosing in a manner in which they are unable to when they both share the same State. While, from a liberal perspective, such a division might, *ceteris paribus*, be entirely justified, it is nonetheless a second best option in response to a problem that arises as a result of the members of each group not respecting the liberal rights of the members of the other group. Consequently, the LD theory, even if it does turn out to have some advantages over the other two types of secession theory, nonetheless appears to find itself in the peculiar position of addressing an issue – i.e. secession – which, if everyone accepted the theory (of liberalism), would not exist.

[145] Dowding, p.72.

5

KASHMIR

5.1 INTRODUCTION

The previous chapters consisted of a process of critical engagement with the three types of secession theory under consideration in this thesis. Two of these theories – Nationalist and Just Cause (JC) theories – were rejected as unsatisfactory, while a number of problems were identified with Beran's Liberal-Democratic (LD) theory. The aim of this and the following chapter is to now analyse these claims in the context of the current secessionist dispute in the Indian-held State of Jammu and Kashmir. However, before introducing this empirical component of the thesis, perhaps it will be useful to elaborate upon some of the broad reasons behind the incorporation of the Kashmir case-study and exactly what is hoped to be gained from its inclusion here.

Clearly the inclusion of the case-study within what is otherwise a highly analytical investigation raises wider questions of to what degree theoretical claims are capable of substantiation through empirical argument. While these issues are largely beyond the scope of the present project, it is important to once again emphasise that despite their high level of theoretical abstraction and sophistication Nationalist, JC and LD theories nonetheless have as their ultimate aim the normative assessment, and eventual resolution, of disputes that are very much a part of the 'real world.' Thus, while each of these three theories stresses abstract rights as such, this is done with a view towards the actual implementation of these rights as a means for resolving conflicts which are a part of the fabric of reality.

Consequently, there is a sense in which, because these theories attempt to interpret and resolve real-life conflicts, they can only be understood and assessed with respect to

those same conflicts. Thus, given the type of material under consideration it is entirely appropriate to include an empirical case study within the thesis. This should by no means be interpreted as an attempt to detract from, or question the importance of, the preceding analytical investigation. However, to acknowledge the significance of analytical argument and logical coherency in the assessment of normative theories of secession is not to also say that empirical claims are thereby irrelevant to such an undertaking. Indeed, the importance of real-world examples in the evaluation of these theories is underscored by the fact that many of the theorists previously considered make frequent appeals to empirical analysis to bolster their respective cases.[1] Accordingly, one often finds in the literature on how liberalism should respond to the related issues of nationalism, secession and minority rights a significant inter-play between theoretical analysis and empirical investigation.

Similarly, the first, and foremost, aim of including this case study on Kashmir is to take the critical insights contained in Chapters Two, Three and Four of this thesis and put them to the test in a real-life, contemporary secessionist dispute and see whether or not they stand up and, if so, how and in what form. The overriding objective is, then, to use the case of Kashmir as illustrative material by examining to what degree the general criticisms made in Chapters Two, Three and Four may be substantiated with empirical data. For example, in Chapter Two it was argued that both subjective and objective criteria of nationhood should be rejected as unsatisfactory. By investigating how one might construct a subjective or objective definition of a Kashmiri nation we may also examine to what extent the criticisms of these criteria are applicable to such an account of national identity and, perhaps, in need of clarification or re-interpretation.

[1] To quote just a few examples: Miller refers to the cases of Canada and Switzerland in support of his distinction between multi-nationalism and multi-communalism. See David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), pp.93-98. Similarly, Kymlicka uses the example of Australian aborigines to support his claim that people are bound to their culture of birth and upbringing in important ways and, thus, that respecting peoples' own cultural membership and facilitating their transition to another culture are not equally legitimate options. See Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), pp.175-77. Kukathas, on the other hand, also uses the example of Australian aborigines – the Ngarrindjeri tribe – in support of his critique of Kymlicka's criteria for selecting what groups will be the bearers of his special rights. See Chandran Kukathas, 'Multiculturalism as Fairness: Will Kymlicka's Multicultural Citizenship', *Journal of Political Philosophy*, Vol. 5, No.4, 1997, p.415.

A less-developed, but nonetheless important, aim is to take a critical look at some of the claims put forward by the various parties to the Kashmir dispute in order to see what normative significance should be attached to such assertions by a liberal theory of secession. Thus, while the thesis does not seek to directly analyse or normatively evaluate claimed rights to secede in Kashmir, it does take a critical look at some of the various arguments given for and against Kashmir's secession with a view towards determining how a liberal theory might deal with these claims. The goal, then, is not to take a normative theory of secession and apply it to the case of Kashmir in order to determine whether Kashmir's secession from India would be morally justified – although this is not to say that much of the following discussion may not be relevant to such an enterprise. Rather, the more modest goal is to determine what we can learn about the normative assessment of secessionist claims by taking some of the arguments advanced in the case of Kashmir and seeing how a liberal theory of secession should respond to these.

Because, however, one cannot properly understand, nor say anything substantive about, the dispute in Kashmir without first knowing something about its historical background, it is first necessary to provide a brief historical narrative which establishes *who* the parties to the dispute are, *what* their competing claims consist of and *why* they are making these demands. The purpose of following discussion is, therefore, to introduce the case-study of Kashmir which will then be related to the preceding theoretical discussion in the following chapter. Before beginning, however, it is vital to stress that Kashmir is a disputed territory, and each party to this dispute promulgates its own version of events in an attempt to legitimise its claims. The purpose of the following discussion is not to arrive at any conclusion as to which version of events is the correct one, or who is telling the truth and who is not. Rather, each version of events and the arguments supporting it will be summarised and contrasted with other, competing accounts. The objective is simply to paint a brief picture of the current situation in Kashmir and, in so-doing, to provide a historical context in which the conflict in Kashmir may then be employed as illustrative material for the preceding theoretical discussion in the manner described.

5.2 PRE-PARTITION KASHMIR

A. Geography & Ethnography of the Region

The term 'Kashmir' is used in reference to a variety of different geographical regions but generally refers to what is known as the 'Vale of Kashmir', or simply 'the Valley', which, since 1947, has been a part of the Indian-held State of Jammu and Kashmir. The State is divided geographically and ethnographically into three regions – Kashmir, Jammu and Ladakh. The people of each region possess a distinct language, religion, culture, ethnicity and, thus, sense of self-awareness, or cultural identity, which distinguishes them from the inhabitants of the other two regions within the State.

Because of their beauty, fertility, geographical location and topography, the areas contained within the Indian-held State of Jammu and Kashmir have for many centuries been highly coveted and regarded as the gateway from Central Asia to the Indian subcontinent. The State's strategic value is equally important today given that it borders on, or is proximate to, Pakistan, Afghanistan, China and States of the former Soviet Union.[2] Additionally, the agriculture of both the Indian and Pakistani districts of Punjab and Sind are dependent upon rivers that either rise in or traverse the State.[3]

The Vale of Kashmir (capital Srinagar) is a place of astounding beauty located at a height of just over six thousand feet, and a mere eighty four miles in length and twenty four miles in width.[4] It is an important centre of rice and fruit cultivation[5] and also possesses some wealth in terms of industrial minerals and precious stones.[6] The majority of Kashmiris are *Sunni* Muslims, although until the recent crisis there existed a minority of Hindus, or *Pandits*. To the south of the Valley lies Jammu – a mainly Hindu region that is an extension of the Punjabi plains (an area of about 12,000 square miles) and is separated from Kashmir by the Pir Panjal mountains[7] which range in

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[2] See, for example, D. K. Joshi, *A New Deal in Kashmir* (New Delhi: Ankur Publishing House, 1978), pp.1-2.

[3] Alastair Lamb, *Kashmir A Disputed Legacy* (Karachi: Oxford University Press, 1992), p.11.

[4] Vernon Hewitt, *Reclaiming the Past?* (London: Portland Books, 1995), p.20.

[5] Lamb, p.9.

[6] K. S. Saxena, *Political History of Kashmir* (Lucknow: Upper India Publishing House, 1974), p.9.

[7] Lamb, p.11.

height from four thousand to twelve thousand feet.[8] To the Valley's east lies the Buddhist region of Ladakh (capital Leh). Ladakh is separated from the Valley by a mountainous range that is traversable for only 5 months of the year and takes the traveller over the 11,300 ft Zoji-La Pass.[9] Ladakh, an extension of the Tibetan Plateau, is a vast, desolate area with one of the lowest population densities in India.[10] Ladakh's inhabitants are almost exclusively Tibetan Buddhists, although there exists a small minority of *Shiite* Muslims concentrated around the Kargil Area.

B. Pre-Islamic History of the Region

Kashmir's early history is obscure. The region was not a part of what scholars refer to as the *Indus river civilisation*, although it evidently witnessed the Aryan invasions that began in approximately 1500-1000 BC.[11] With these invasions the residents of the region were introduced to Hinduism which gradually came to supplant the existing animist religion known as *Naga*.[12] Knowledge of this early phase of Kashmiri history is derived mostly from archaeological evidence and a set of twelfth century AD. chronicles entitled the *Rajatarangini* ('River of Kings') by Kalhana.[13] The historical veracity of the *Rajatarangini* is questionable, and its earlier portions are very much hearsay and traditional lore. The first ruler of the Valley upon whose identity historians are generally agreed is that of the Buddhist emperor Ashoka (274-237 BC.), and it is he who is credited with founding the city of Srinagar.[14]

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[8] Hewitt, p.20.

[9] Hewitt, p.20.

[10] Four people per square mile (Hewitt, p.21).

[11] See Hewitt, p.26

[12] See Victoria Schofield, *Kashmir in the Crossfire* (London: Tauris, 1996), p.1. The authority of Hindu ideas is directly derived from a set of *Vedic* scripts, some of which date back to 1,000 BC. A feature of Hinduism is that of *caste* which arose from an economic division of labour, where professions were ranked hierachically according to an index of polluting or non-polluting tasks. The most powerful caste was that of the *Brahmins*, who possessed the greatest material wealth and social prestige. Hinduism rationalised the economic basis of caste by reference to other religious ideas such as *dharma* and *karma*, thus providing a religious justification for a system of social organisation characterised by vast inequalities of material wealth and social prestige (Hewitt, pp.26-29).

[13] Lamb, p.9.

[14] See Saxena, p.16; and Joshi, p.16. After Ashoka's death Buddhism continued to flourish in Kashmir (Hewitt, p.31; and Saxena, pp.23ff).

Buddhism directly challenged the authority of Hindu Vedic scripts upon which the authority of the ruling Brahmins were based, and condemned the practice of caste and the social prejudices which it created. As a movement committed to radical social reform Buddhism gained immense popularity. However, after several dynasties adopted Buddhism as the courtly faith, it began to lose its popular status as a vehicle for social change.[15] As a result, in the middle of the ninth century AD., Buddhism was supplanted by the Hindu reform movement of *Shaivism*[16] known as *T(r)ika Sastra.*[17] A product of its religious forebears, *Shaivism* was the outcome of the blending of Buddhist and Vedic cultures with some uniquely Kashmiri insights.[18]

Kashmir at various times, suffered under the cruellest and most barbaric of tyrants. The two most notable rulers of pre-Islamic Kashmir appear to be Lalitaditya (724-760 AD.)[19] who erected the great temple of Martand, and Avantivarman (855-883 AD.)[20] who constructed extensive drainage and irrigation schemes in the Valley. Archaeological evidence and literary sources suggest that during the period 600-855 AD. the Valley was the centre of a powerful regional kingdom whose influence extended north into Baltistan and as far south as Rajasthan.[21]

C. The Arrival of Islam & the Sultan Dynasty

From the twelfth to the fourteenth centuries the last remnants of a centralised Hindu State were swept from northern India and replaced by Islamic dynasties. There appears to have been no effort to prevent Islamic teachers and preachers entering the Valley,[22] and in the second half of the fourteenth century seven hundred followers of Saiyyid Ali

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[15] Moreover, there is evidence that by the early fifth century AD. some Buddhist priests had adopted Brahmanical practices based upon conceptions of spiritual pollution (Hewitt, p.32).

[16] i.e. the worship of the Hindu god *Siva*.

[17] Sunil Chandra Ray, *Early History and Culture of Kashmir* (New Delhi: Munshiram Manoharlal, 1970), pp.165ff.

[18] Prem Nath Bazaz, *Kashmir in Crucible* (New Delhi: Pamposh Publications, 1967), p.10. The popularity of *Shaivism* is often attributed to its emphasis upon magical practice, sexual rites, secret societies and the fact that, unlike earlier Hindu Vedic practices, it did not exclude lower social orders (e.g. see Hewitt, p.33).

[19] Ajit Bhattacharjea, *Kashmir The Wounded Valley* (New Delhi: UBSPD Publishers, 1994), p.26.

[20] Bhattacharjea, p.27; and Scofield, pp.9-11.

[21] See Hewitt, pp.33-34; Saxena pp.51-89, pp.109-36; and Bhattacharjea, pp.26ff.

[22] Hewitt, p.35.

Hamdani arrived in Kashmir from the Persian city of Hamadan.[23] Gradually most Kashmiris converted to Islam, however these conversions appear not to have been the result of force.

The popular appeal of Islam is often explained by reference to the meditative, eclectic form of Islam introduced to the Valley: The followers of Saiyyid Ali Hamdani, who were fleeing the cruel intolerance of Persia's conqueror Timur, were a collection of meditative, mystic *Sufis*[24] who emphasised the universality of all religions,[25] thus furthering the personal and devotional routes to salvation contained in the Valley's earlier religions of Buddhism and *Shaivism*.[26] This fitted in well with the popular idiom of thirteenth and fourteenth century Kashmir where religious observance was traditionally practised by the laity itself, and was aimed at personal salvation and liberation.[27]

As in the case of *Shaivism*, the introduction of Islam resulted in the emergence of a composite culture, often referred to as *religious humanism*.[28] While Kashmiri Islam stands on the cardinal principles of the Koran it has been deeply influenced by ancient Kashmiri culture. Kashmiri Muslims share with the Pandits many inhibitions, superstitions, idolatrous practices, social liberties and intellectual freedoms which are alien to Islam.[29] Evidence of this blending of cultures can be seen in the distinctive style of traditional architecture where Islamic spires rise from structures with designs that are Buddhist in origin, and the numerous shrines throughout the Valley which are

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[23] Bhattacharjea, p.30. As early as the eleventh century AD. attempts had been made by Muslims to conquer the Valley. Mahmud of Ghazni tried to take the Valley twice in 1015 and 1021 but both times was unable to cross the Pir Panjal range (Bhattacharjea, p.27; and Hewitt, p.35).

[24] Muslim mystics associated with Persia, who objected to the excessive codification and strict interpretation of the Koran. See Hewitt, p.35. Also see A. Q. Rafiqi, 'Sufism in Kashmir' in *Contemporary Relevance of Sufism*, ed. Syeda Saiyidain Hameed (New Delhi: Indian Council for Cultural Relations, 1993), p.322.

[25] Bhattacharjea, p.30.

[26] Hewitt, p.34. For a full account of Kashmir's conversion to Islam see Mohammad Ishaq Khan, *Kashmir's Transition to Islam: The Role of Muslim Rishis* (New Delhi: Manohar, 1994).

[27] Hewitt, pp.33-36. Also see Rafiqi, p.322; Mohammed Ishaq Khan, 'Evidence of Social Protest In Sufi Literature: A Case Study of Kashmir' in *Contemprorary Relevance of Sufism*, ed. Syeda Saiyidain Hameed (New Delhi: Indian Council for Cultural Relations, 1993), p.299; Bhattacharjea, pp.32-33; and Rafiqi, p.322.

[28] R. N. Kaul, *Sheikh Mohammed Abdullah* (New Delhi: Sterling Publishers, 1985), p.2.

[29] See Bazaz, p.14; Riyaz Punjabi, 'Kashmir: The Bruised Identity' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.137; and Kaul, p.3.

revered by Hindus and Muslims alike.[30] This common cultural heritage is a constituent component of a distinct sense of politico-cultural self-identity in the Valley known as *Kashmiriyat*, which historically has frequently overridden religious differences amongst Kashmiris. Consequently, any religious intolerance in the Valley was usually the product of the personality of the ruler or competing factions of the nobility seeking to promote their own self-interest or economic considerations.[31]

The first Muslim ruler of Kashmir was Rinchin, who captured the Valley in 1320 after it was sacked by the Mongols. Following Rinchin's death power reverted to a Hindu queen, however in 1339 Shah Mir crowned himself Sultan Shamsuddin, thus beginning the *Kashmiri Sultanate* (which was to last almost two hundred and thirty years) and, more significantly, almost five hundred years of uninterrupted Muslim rule in the Valley. Most of the Sultans of Kashmir tolerated the Valley's Hindus, allowing them to build temples and carry on as normal.[32] Any 'Kashmiri golden age' existed under the rule of Sultan Zain-Ul-Abidin (1420-1470)[33] who encouraged the Hindus to return to the Valley by rebuilding their temples, undertook numerous public works, encouraged the growth of handicraft industries for which Kashmir was later to become famous and revived scholarly pursuits. His death was followed by a period of civil war and strife that opened the Valley to external influences.

D. The Moghuls, Afghans & Sikhs

In 1586 Kashmir was conquered by Akbar the Great (1556-1605) and formally integrated into the Moghul Empire. The Moghuls were Sunni Muslims who ruled their vast Indian empire from the Indian plains. Moghul rule consisted of the appointment of revenue-collecting officials and the establishment of elaborate rights over revenue producing lands. The nobility were converted into *Jagidars*, who retained rights to a

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[30] Bhattacharjea, p.35.

[31] For example the need to pay the army on some occasions necessitated the confiscation of temple property. See D. D. Kosambi, *An Introduction to the Study of Indian History* (Bombay: Popular Book Depot, 1956), p.337. Also see P. S. Verma, *Jammu and Kashmir at the Political Crossroads* (New Delhi: Vikas Publishing House, 1994), pp.4-5.

[32] The two notable exceptions were Sultan Sikander (1389-1413) and Ali Shah (1413-20), both of whom are associated with the murder of Hindus, the destruction of their temples and their forced conversion to Islam (Hewitt, p.37).

[33] Josef, Korbel, *Danger in Kashmir* (Princeton: Princeton University Press, 1954), p.11.

proportion of the revenue generated by the land for which they were accountable and paid the remainder to the Moghul Court.[34] In addition, Kashmir was overseen by a governor (*Subhedar*) directly accountable to the emperor.[35] In return the Kashmiris benefited from *Pax Mughala* and were exposed to broad northern Indian influences.[36]

By the middle of the eighteenth century Moghul power had waned considerably and the Valley became a distant outpost cut off from a shrinking empire. With the gradual collapse of Moghul authority and the increasing greed and brutality of its provincial governors, two members of the Kashmiri nobility invited the Afghans to enter Kashmir and rid it of Moghul influence in 1752.[37] Afghan rule is generally depicted as a period of lawlessness and religious persecution of both non-Muslims and non-*Shiites*. The Afghans were extraordinarily brutal and exhorbitantly taxed the people to pay for their almost constant military campaigns, bankrupting the Valley by destroying the shawl trade in the process.[38]

In response to another invitation from the Kashmiri nobility, Ranjit Singh, under the guidance of his ally Gulab Singh, annexed the Valley in 1819 making it a part of the Sikh empire. As a reward for his assistance, Gulab Singh was given the title of *Jagir* and entitled to administer Jammu.[39] Sikh rule is usually characterised as being little different to that of the Afghans. The main sources of knowledge concerning the condition of the Valley's population at this time are the writings of various British travellers. In 1824 one such traveller, William Moorcroft, wrote:

> Everywhere the people are in the most abject condition, exorbitantly taxed by the Sikh Government and subjected to every kind of extortion and oppression... Not more than one sixteenth of the cultivable land is in cultivation and the inhabitants, starving at home, are driven

[34] The emperor was the sole proprietor of all cultivable land in the Valley (Bazaz, p.21).

[35] Hewitt, p.41.

[36] The rule of the Moghuls appears to have been a time of stability in Kashmir. While there are some reports of famine, floods and plague in the seventeenth century (Hewitt, p.43; and Bhattacharjea, p.43), most complaints against Moghul rule seem to have been based upon the character of successive governors and the zeal with which they extracted taxes.

[37] Lamb gives the date for the incorporation of Kashmir into the Afghan empire as 1752 (Lamb, p.9) as does Bhattacharjea (Bhattacharjea, p.45), Hewitt alone gives the date as being 1753 (Hewitt, p.45).

[38] See, for example, Schofield, pp.29-30.

[39] Hewitt, pp.46-47.

> in great numbers to the plains of Hindustan... Butchers, bakers, boatmen, vendors of fuel, public notaries, scavengers, prostitutes, all paid a sort of corporation tax.[40]

E. The Dogra Kingdom to Maharaja Hari Singh

Gulab Singh followed a strategy of expansionism conquering Ladakh in 1834 and Baltistan in 1840.[41] The British, who were by now the dominant force on the subcontinent, grew increasingly concerned about the break-down of order in Punjab following Ranjit Singh's death in 1839 and the growing influence of Czarist Russia in the region. Events culminated in the British defeating the Sikhs in a hard fought campaign which was ended by the 1846 *Treaty of Amritsar* in which the British awarded Gulab Singh the territories of Kashmir, Ladakh, Gilgit and Chamba for the sum of Rs750,000.[42] Consequently, Kashmir became a part of what is often termed the *Dogra Kingdom*.[43]

Maharaja Gulab Singh was succeeded by his son Ranbir Singh in 1857, who was himself succeeded by his son Pratap Singh in 1885. British concern about the administration of the Dogra Kingdom[44] and the security of their northern frontiers against Czarist influence[45] led to the installation of a *British Resident* in the State in 1885,[46] and the 1889 removal of Pratap Singh's governing powers in favour of a

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[40] William Moorcroft and George Trebeck, *Travels in the Himalayan Provinces of Hindustan and Punjab*, Vol.II, pp.293-94.

[41] See Hewitt, p.48; and Lamb, p.ix.

[42] See Schofield, pp.49-62. The decision to award these areas to Gulab Singh seems to have been a pragmatic mixture of practical considerations and the desire to reward Gulab Singh for his assistance during both the Sikh, and the earlier Afghan Wars. The Sikh Wars had drained the resources of the *British East India Company*, while the region's distance from the centre of British administration in the subcontinent and lack of easy access would not have endeared the British to the idea of governing the region directly. On Gulab Singh's assistance to the British during the Afghan and Sikh Wars see Lord Birdwood, *Two Nations and Kashmir* (London: Robert Hale, 1956), pp.26-28. Also see Bhattacharjea, pp.50-55.

[43] The term "Dogra" is a corruption of the Sanskrit word for two lakes and refers to the name of the Rajput dynasty that ruled the land between the Mansar and Siroinsar lakes (Hewitt, p.19).

[44] There had been a disastrous series of famines in the Valley, the worst of which was in 1877 when up to a third of the Valley's population is reported to have perished (Lamb, pp.12-13; and Bhattacharjea, pp.58-59).

[45] Schofield, p.75.

[46] The resident was the official representative of the British Crown in the princely court. He was a person of great importance and no monarch could afford to ignore his advice or insult his honour. Since 1846 there had been only a *British Officer on Special Duty* in Kashmir who was able to exercise few governing powers. In 1885, however, this Officer on Special Duty became the State's British Resident.

Council of State in which the final arbiter was the British Resident.[47] During this time the British carried out some limited land and labour reforms, which mildly alleviated the condition of the Valley's Muslims. In 1905 some of the Maharaja's powers were returned to him, and this process was virtually complete by 1922. Thus, by the time Pratap Singh died in 1925 to be succeeded by his nephew Hari Singh, the State was still very much an autocracy.[48] Hari Singh continued to discriminate against the Valley's Muslim majority. Hindus alone were allowed licenses to possess firearms, and Muslims were excluded from serving in the State's armed forces.[49] Furthermore, while the land settlement devised by the British theoretically left the cultivator with seventy percent of the land's yield, zealous *Jagadirs* and a burdensome tax regime kept the Muslims, most of whom were peasants, in poverty.[50]

In 1905 the religious leader of the Muslims of the Vale, Mirwaiz Maulvi Rasool Shah, formed the *Anjuman-i-Nusrat-ul-Islam* to improve the lot of Kashmiri Muslims, especially with regard to education, and to ensure the spread of pure Islamic doctrine.[51] The *Anjuman-i-Nusrat-ul-Islam*, which was followed by other Kashmiri Muslim groups in the 1920s and 1930s,[52] became a centre of activism against the rule of the Maharaja, embarking in the 1920s upon an examination of the social reforms necessary to improve the condition of the Muslim community, and sending delegations to the State government to seek redress of Muslim grievances. While none of these groups were particularly effective in securing substantive economic or political reform, they nonetheless established an important precedent of Muslim organisation in the Valley and helped to publicise the plight of the State's Muslims. In March 1929 Sir Albion

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[47] Lamb, p.13; and Schofield, pp.80-83.

[48] See Lamb, pp.13-14.

[49] This practice was introduced by the Moghuls and continued by the Afghans, Sikhs and Dogras. See Bazaz, p.21. Also see Tavleen Singh, *Kashmir. A Tragedy of Errors* (New Delhi: Viking, 1995), p.XIV.

[50] While the reforms of the British theoretically improved the lot of the Valley's Muslim majority, many writers have cast doubt upon what occurred in practice. Land reform is but one example, another is the practice of *begar* (i.e. forced labour) where men were literally dragged from their homes by the Maharaja's troops to work on the State's roads – an inherently dangerous task from which many did not return. While the British officially outlawed *begar* in 1893, there is evidence that it persisted, particularly in remote areas, until 1947. See Lamb, pp.83-84; Punjabi, p.135; Korbel, p.15; and Sumit Ganguly, *The Crisis in Kahmir. Portents of War. Hopes of Peace* (New York: Cambridge University Press, 1997), p.30.

[51] See Lamb, p.85; and Hewitt, p.70.

[52] e.g. the *Anjuman-i-Hamdard Islam*, *Anjuman-i-Tahaffuz-i-Namaz-Wa-Satri-Masturat* and the *Anjuman-i-Islamia* in Jammu (Lamb, p.86).

Bannerji resigned his position as Senior Member of the Council of State of Jammu and Kashmir, publicly declaring:[53]

> Jammu and Kashmir State is labouring under many disadvantages, with a largely Muhammadan population absolutely illiterate, labouring under poverty and very low economic conditions of living in the villages and practically governed like dumb driven cattle. There is no touch between the Government and the people, no suitable opportunity for representing grievances and the administrative machinery itself requires overhauling from top to bottom to bring it up to the modern conditions of efficiency. It has at present no sympathy with the people's wants and grievances.[54]

Because of the interest of the various *Anjuman* in educational reform, a number of Kashmiri Muslims were able to leave the State and study in institutions of higher learning in British India, such as the *Aligarh Muslim University*.[55] It is a matter of more than mere coincidence that once the first Kashmiri graduates from Aligarh began to return to Kashmir, there began for the first time an organised opposition movement against the rule of the Maharaja.[56] Additionally, many of those who would dominate the politics of the State for decades to come, were those who had benefited from the educational scholarships provided by the various *Anjuman*.

F. Sheikh Mohammed Abdullah

By the beginning of the 1930's the first Kashmiri graduates who had benefited from the scholarships provided by the various *Anjuman* returned to the Vale. The result was a new focus of opposition to the Maharaja's rule, based upon the inability of these graduates to secure positions in the State's administration which, as the table below demonstrates, was heavily monopolised by the Pandit community.

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[53] Sir Albion, an Indian Christian, since 1927 had been Senior Member of the Council of State of Jammu and Kashmir (a position which was soon to be renamed Prime Minister). See Lamb, p.88.

[54] See Lamb, p.88; and Bhattacharjea, p.63.

[55] Founded in 1875 as a centre for Muslim learning by Sir Syed Ahmad Khan (Korbel, p.33).

TABLE 5.1. REPRESENTATION OF MUSLIMS AND NON-MUSLIMS IN GOVERNMENT SERVICES (1930-31)[57]

Department	*Total number of officials*	*Non-Muslims*	*Muslims*	*Percentage of Muslims*
Forest	124	120	4	3.2
Customs	159	150	9	5.8
Education	62	56	6	9.6
Judiciary	37	33	4	10.8
Medical	220	188	32	14.5
Revenue	148	113	35	23.6
Treasury Police	201	188	13	6.4
From IGP to Sub-Inspectors	87	71	12	13.2
Constabulary	1378	728	650	47.1

One such graduate who would come to dominate politics in the State was Sheikh Mohammed Abdullah (1905-82). Abdullah co-founded the *All Jammu and Kashmir Muslim Conference* in 1932 which became the major vehicle for opposition to the Maharaja. In response to unrest within the State and the resignation of Sir Albion Bannerji, the British established the *Glancy Commission*, which led to the adoption of a constitution in the State. The constitution granted a degree of freedom of speech and established a legislative assembly which, though it possessed little power, created a forum for political activity which the Muslim Conference was able to dominate.[58]

[56] See Lamb, pp.88-89.

[57] Verma, p.13.

[58] The Legislative Assembly contained thirty three elected seats out of a total of seventy five. The remaining forty two seats were held by members appointed by the Maharaja. Of the thirty three elected seats twenty one were reserved for Muslims, ten for Hindus and two for Sikhs. The assembly did not possess any final authority and could only advise the Maharaja who retained ultimate authority in the State. The constitution was replaced in 1938 by another which expanded the number of elected seats to forty (see Lamb, pp.92-94; Hewitt, pp.70-71; Bhattacharjea, pp.70-71; and Bazaz, p.30). Additionally franchise was limited those residents of the State who were literate, possessed a minimum amount of property and whose annual income was above the equivalent of US$80. As a result only a paltry eight percent of the population was eligible to vote in Legislative Assembly elections. See Korbel, p.19.

Abdullah's Muslim Conference gradually widened its agenda beyond demanding jobs for Muslims, to demands for social, political and agrarian reform. In 1938 Abdullah met Jawaharlal Nehru and abandoned Muslim orthodoxy in favour of a secular approach declaring:

> Like us, the Hindus and the Sikhs suffer innumerable disabilities under the present system of government. They too are steeped in ignorance. They too pay taxes. They too face hunger. The institution of the responsible government [*sic*] is as necessary for them as it is for us. So it is necessary that we change our organisation into a non-communal political organisation and amend its constitution.[59]

This shift in Abdullah's ideology may be attributed to: (a) his association with Nehru and exposure to liberal ideas; (b) the fact that Islamic radicalism had never been popular in Kashmir; and/or (c) financial advantage.[60] Whatever his reasons, Abdullah continued to accelerate the process of secularisation by dissolving the Muslim Conference in 1939, replacing it with the *Jammu and Kashmir National Conference* and becoming deeply involved the *Indian National Congress Party* within which his close friend Nehru was rapidly becoming the predominant figure. This process of secularisation was not appreciated by the conservative Islamic elements in Kashmiri politics, who revived the Muslim Conference and allied with the *Indian Muslim League* of Mohammed Ali Jinnah – who would go onto to form the State of Pakistan and who strongly disliked both Abdullah and Nehru.[61]

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[59] Quoted in R. K. Kaul Bhatt, *Political and Constitutional Development of the Jammu and Kashmir State*, (Delhi: Seema Publications, 1984), p.85.

[60] This suggestion is made by Lamb in reference to the *Ahmadiya* sect of Islam. The *Ahmadiyas* were regarded as heretics by many Muslims, although their business acumen, unlike their faith, seems to have been above reproach. The suggestion is that Abdullah may have found some personal financial advantage in adopting a more sympathetic approach towards the *Ahmadiya* community. See Lamb, p.93.

[61] See Verma, p.29. Also see Prem Nath Bazaz, *History of the Struggle for Freedom in Kashmir* (New Delhi, Pamposh Publications, 1954), pp.153-54 and p.179; and Jyoti Bhusan Das Gupta, *Jammu and Kashmir* (The Hague: Martinus Nijhoff, 1968), p.62.

5.3 PARTITION

A. Introduction

After a long campaign for independence, on 4 June 1947, the British Viceroy, Mountbatten, announced that the British departure date from India would be 15 August 1947.[62] The two challengers to the British in India were Jinnah's Muslim League which was founded in 1906[63] to further the interests of Muslims, and was calling for the creation of a separate Muslim State (Pakistan), and Nehru's Congress Party. All attempts to avoid the partition of the Subcontinent failed. Muslim League-Congress intransigence at the Shimla conference in 1946, and the inability of Congress and Muslim League members of the interim government established by Lord Wavell the same year to work together, demonstrated that maintaining Indian unity was an impossible task.[64] Consequently, Pakistan was created as a result of the so-called *Two Nation Theory* advanced by the Muslim League which stated that: (a) Hindu and Muslim communities constituted two separate nations – and thus when the British granted independence they must do so to two States not one; and (b) the welfare of Muslims could not be guaranteed in a Hindu-majority State.

The British Indian Empire, or *Raj*, was comprised of two different types of States: those under direct British administration (*British India*); and those under the administration of a native ruler who recognised the British as the *paramount power* in India (*princely India*). This notion of *paramountcy* in addition to various treaty rights and obligations, tied each regional kingdom to the British crown.[65] In effect these princely kingdoms were autonomous except in the vital areas of defence, foreign affairs and communications.[66] Of the 584 States of princely India,[67] the two States of Hyderabad and Jammu and Kashmir were dominant due to their large populations and geographical size.[68]

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[62] Lamb, p.101.

[63] Bhattacharjea, p.86.

[64] See Hewitt, pp.63-65.

[65] See Hewitt, p.53.

[66] Ganguly, p.6.

[67] Korbel, p.46.

[68] Princely India accounted for forty percent of the subcontinent's area and had a population of over ninety million people. See Damodar R. Sar Desai, 'Origins of Kashmir's International and Legal Status'

Two *Boundary Commissions*, one to deal with Bengal in the east, the other to deal with Punjab in the west, headed by Sir Cyril Radcliffe,[69] were charged with deciding where the boundaries of the two successor States to the Raj would fall in British India. The decisions of the two Commissions would be final. Each Commission was comprised of two Muslims and two Non-Muslims who usually voted on communal lines. Thus, Sir Cyril's casting vote frequently decided the award of territories. The Commission's terms of reference were:

> To demarcate the boundaries of the two parts of the Punjab on the basis of ascertaining the contiguous majority areas of Muslims and non-Muslims. In doing so, it will also take into account other factors.[70]

With the lapse of Paramountcy the States of princely India – the partition of which was governed by the concepts of the *Standstill Agreement* and the *Instrument of Accession* – technically became independent.[71] The Standstill Agreement was an interim measure where essential services to a State could be maintained until that State joined either India or Pakistan. In contrast, the Instrument of Accession was a permanent agreement whereby a State acceded to either India or Pakistan, ceding to that State authority in the areas of foreign affairs, defence and communications which had previously been the preserve of the British as the paramount power.[72] The decision as to which polity the State would join was that of the ruler alone – there was no provision, legal or otherwise, for popular consultation.[73] Generally a State's

in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.82.

[69] The Vice Chairman of the *English Bar Council* whose major qualification for the job was that he was totally inexperienced and ignorant about Indian affairs – which at the time was seen to be a prudent qualification against any charges of bias.

[70] See Lamb, p.104; and Hewitt, p.66. What "other factors" the Commissions were to take into account were never spelled out.

[71] See the *British Cabinet Mission Memorandum* of 12 May 1946 (Command Paper 6855) which stated that "...the rights of the States which flow from their relationship to the Crown will no longer exist and that all the rights surrendered by the States to the Paramount Power will return to the States." Quoted in Sar Desai, p.82. Also see Korbel, p.47.

[72] See the *British Cabinet Mission Memorandum* of 16 May 1946 (Command Paper 6821) which stated that aside from the areas of foreign affairs, defence and communications "[t]he States will retain all subjects and powers other than those ceded to the Union." Additionally Mountbatten promised the princes that having acceded to either India or Pakistan neither government would have the authority "...to encroach on the internal autonomy or the sovereignty of the States." See Nicholas Kaye, *Time Only to Look Forward. Speeches of Rear Admiral the Earl Mountbatten of Burma* (London: N. Kaye, 1952), p.55.

[73] See Sar Desai, p.82.

geographical context made the ruler's decision for him. However, in order to rule out the further Balkanisation of the subcontinent, the British strongly discouraged notions of independence or the rulers of those States not contiguous with Pakistan from joining Pakistan.[74]

B. Kashmir Prior to Partition

The fate of Jammu and Kashmir State had already attracted the attention of the Congress and Muslim League. While the State's strategic geo-political location remained a significant issue,[75] there was now the added factor of Jammu and Kashmir's relationship to the founding ideologies of the two States which succeeded the British Raj. Ganguly explains:

> The dispute over the accession of Kashmir to India can be traced to the profoundly divergent conceptions of nation-building that underlay the Indian and Pakistani nationalist movements. The Indian National Congress, which spearheaded the Indian nationalist movement, was committed to the notion of creating a secular and democratic state. The Pakistani nationalist movement, in contrast, sought to create a religiously based state that would serve as a homeland for South Asian Muslims. Possession of Kashmir, a Muslim-majority state abutting the two nascent states, therefore assumed a significance far greater than a mere territorial claim. For Indian nationalists such as Nehru, the integration of Kashmir into India was critical because it would demonstrate that all faiths could live under the aegis of a secular state. By the same token, Pakistani nationalists such as Mohammed Ali Jinnah saw the absorption of Kashmir into Pakistan as equally critical, but for diametrically opposite reasons. For Jinnah, Pakistan would be "incomplete" without Kashmir. In essence, Pakistan's claim to Kashmir was and remains irredentist.[76]

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[74] Raju G. C. Thomas, 'Reflections on the Kashmir Problem' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.19. There was a concern that the Muslim *Nizam* of Hyderabad – a Hindu majority State – would opt for Pakistan and thus create a Pakistani enclave in India. Similarly there was a rumour that the *Khan* of Kalat was considering joining India which would have created an Indian enclave surrounded by the Pakistani province of Baluchistan (Hewitt, p.67).

[75] The main determinant of the area's strategic value remained its geographical proximity to Soviet Russia. Of particular concern was the area known as the *Gilgit Agency* which the British had leased from the Maharaja for sixty years in 1935 in order to observe and, if necessary, counter Soviet influence in Sinkiang. It was agreed that prior to independence the lease would lapse and the area would revert to Dogra control. The motives behind the region's reversion to Dogra control are the subject of some speculation and controversy amongst historians but are beyond the scope of the present analysis. See Hewitt p.68; and Lamb, pp.107ff.

[76] Ganguly, p.8. Also see Korbel who emphasises that the dispute over Kashmir is not territorial but fundamentally a clash of ideologies in which Kashmir has become both a symbol and a battleground (Korbel, pp.25ff).

Numerous factors complicated Jammu and Kashmir's accession. Within the State were two political groups vying for popular support – the Muslim Conference (who favoured the Muslim League, i.e. Pakistan) and the National Conference (who favoured Congress, i.e. India). Moreover, seventy-seven per cent of the State's 4,021,616 people were Muslim, however the Maharaja – in whose hands their fate rested – was Hindu.[77] Being contiguous with Pakistan, the Maharaja could realistically consider accession to either India or Pakistan. However, the geographical and economic links between Jammu and Kashmir and Pakistan were better than those with India.

> At the moment of Partition in 1947 there existed but one road from India to Jammu, by way of Pathankot; and this was then of the poorest quality and much of it unsurfaced. The only railway in the State in 1947 was a short branch line (opened in 1890) linking Sialkot in the Punjab with Jammu City. It was to be severed in the process of Partition in the Punjab which put Sialkot on the Pakistani side.[78]

The Boundary Commission's findings were greeted with uproar, particularly regarding the four *tehsils*[79] of Gurdaspur. Of these four *tehsils* three went to India, despite the fact that only one *tehsil* (Pathankot) had a Hindu majority.[80] The award of these *tehsils* gave India greatly improved connections with the State to rival those of Pakistan, and thus made the accession of the Dogra kingdom to India a practical, as opposed to a merely theoretical, possibility. Consequently Pakistan has alleged that the process of partition was manipulated in order to favour the interests of India.[81] Had the principles of the Boundary Commissions been applied to the Dogra kingdom large parts of the territory (including the Valley) could have gone to Pakistan. However, the logic of the Commissions applied only to British India. Nevertheless Jinnah believed that, despite its princely status, the Dogra Kingdom, as a Muslim-

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[77] 1941 census data cited in Ramesh C. Dogra, *Jammu and Kashmir: A Select and Annotated Bibliography of Manuscripts, Books, Articles etc* (Delhi: Ajanta Publications, 1986), p.28.

[78] Lamb, p.11.

[79] i.e. sub-districts.

[80] See Lamb, p.103; and Schofield, pp.125-31. In addition to the Hindu-majority *tehsil* of Pathankot, India was also awarded the *tehsils* of Batala and Gurdaspur, the remaining *tehsil* of Shakargarh went to Pakistan.

[81] See Lamb, pp.114-15. Birdwood states that the main reason for awarding the *tehsils* of Batala and Gurdaspur to India was that their award to Pakistan would have isolated the important (Indian) district of Amritsar from surrounding Indian soil (Birdwood, p.75).

majority area, should go to Pakistan. Jinnah explained on 17 May 1947 the significance of the name Pakistan:

> the derivation of the word Pakistan – P for Punjab; A for Afghan (i.e. Pathan or Northwest Frontier Province); K for Kashmir; I for nothing because that letter was not in the word in Urdu; S for Sind and TAN for the last syllable for Baluchistan.[82]

C. The Crisis of Accession

On the eve of transfer only four princely States had not acceded to either India or Pakistan: Junagadh, Kathiawar, Jammu and Kashmir and Hyderabad.[83] Junagadh had a population of 670,719 of whom eighty-percent were Hindu, however they were ruled by a Muslim Nawab who on 15 August 1947 acceded to Pakistan despite not being geographically contiguous with it.[84] On 25 October 1947 India intervened militarily in the State to restore order in the districts of Mangrol and Babariawad.[85] On 20 February 1948 a plebiscite was held in Junagadh in which the overwhelming majority of voters elected to accede to India, however Pakistan continues to claim Junagadh as a part of its territory.[86]

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[82] See Lamb, p.107.

[83] Hewitt, p.68.

[84] Junagadh did have a long coastline along the Indian Ocean, so theoretically there was an unobstructed line of maritime communication with Pakistan. However the geographical situation was complicated by the fact that there were pockets of Junagadh territory in the middle of other States which had already acceded to India, and within Junagadh itself there were pockets of territory which had expressed a wish to join India. See Lamb, p.127; and V. P. Menon, *The Story of the Integration of the Indian States* (Delhi: Longmans, 1956), pp.126-27.

[85] The *Sheikh* of Mangrol had declared his independence from Junagadh on 15 August 1947 and subsequently acceded to India. Soon after, however, the *Sheikh* withdrew his accession – allegedly under duress. Similarly Babariawad had asserted its independence from Junagadh and acceded to India. Junagadh responded by sending troops to occupy Babariawad. Refer Menon, pp.133ff. Also see P. Ziegler, *Mountbatten. The Official Biography* (London: Collins, 1985), pp.442ff.

[86] The *Dewan* of Junagadh, Sir Shah Nawaz Bhutto (father of future Pakistani Prime Minister Zulfikar Ali Bhutto), enjoyed a close relationship with Jinnah. Some writers have suggested that the accession of Junagadh to Pakistan was manipulated by Pakistan in order to positively influence the accession of Jammu and Kashmir to Pakistan. There are a number of possibilities: Junagadh might have been exchanged for Jammu and Kashmir; the provocation of military action by India in order to secure Mangrol might have provided justification for Pakistan taking similar action in the case of Jammu and Kashmir; or the Junagadh situation might have been exploited in order to establish a precedent whereby the problem of Jammu and Kashmir could be settled by a plebiscite. Refer H. V. Hodson, *The Great Divide. Britain – India – Pakistan* (London: Hutchinson, 1969), Ch 4. Also see Ziegler, pp.442-43.

Over eighty-five percent of Hyderabad's sixteen million people were Hindu, yet they were ruled by a Muslim *Nizam,* who had previously declared his intention to assume the status of an independent sovereign following the lapse of paramountcy.[87] India concluded a standstill agreement with the *Nizam* but soon alleged that the *Nizam* had seriously breached it.[88] Additionally, *Razakars*[89] from Hyderabad had massacred Hindu villagers in neighbouring States and attacked trains passing through the State's territory.[90] On 13 September 1948 India sent troops into Hyderabad to restore order and annexed the State.

Meanwhile, Hari Singh's failure to accede to India or Pakistan meant that the State was now technically independent. On 14 November 1946 the State's British Resident, Colonel Wilfred Webb, reported to Mountbatten that, "The Maharaja's attitude is, I suspect, that once Paramountcy disappears Kashmir will have to stand on its own feet, and that the question of loyalty to the British Government will not arise and that Kashmir will be free to ally with any power – not excluding Russia – she chooses."[91] Thus, the Maharaja's failure to accede cannot have come as any surprise. Indeed, declaring independence was the Maharaja's best chance of maintaining his power and position.[92] On 15 August 1947 a Standstill Agreement was concluded by the State with Pakistan, but no such agreement was ever reached with India despite the State seeking it.[93] However, despite the Maharaja's best intentions – whatever they may have been – events were soon to over-take him.

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[87] See Menon, pp.317ff.

[88] For a full account of these alleged breaches refer Menon, pp.346-47.

[89] A private army of Muslim irregulars.

[90] See Menon, pp.356ff.

[91] *Constitutional Relations Between Britain and India. The Transfer of Power*, Vol. IX, No.37. Also see Birdwood, p.40; and Joshi, pp.8-9 and 28-29. Also see a letter allegedly written by Hari Singh to a 'friend' in which he states his intention of declaring independence. See *The National Herald*, Lucknow, 10 January, 1947; and Riyaz Punjabi, 'Kashmir Imbroglio: The Socio-Political Roots', *Contemporary South Asia*, Vol.4, No.1, 1995, pp.41-42.

[92] Hari Singh's future as a Hindu ruler in Islamic Pakistan would be uncertain, while was no friend of either Nehru or Abdullah; both of whom he had jailed in the past. Additionally, Birdwood suggests that the Maharaja may have chosen to pursue independence in the belief that doing so would avert the State being drawn into the Muslim-Hindu holocaust that accompanied the partition of the neighbouring State of Punjab. See Birdwood, p.41.

[93] See Lamb, p.122; and Birdwood, pp.45-46.

Since June 1947 there had been disturbances in the Poonch region of the State, the inhabitants of which had never really reconciled themselves to the Maharaja's rule.[94] The insurrection continued to intensify and the area was placed under martial law. Meanwhile communal tensions erupted across northern India resulting in enormous loss of life. Pakistani nationals – usually characterised as being tribesmen from the North West Frontier Province of Pakistan (NWFP) – and numbering about 3,000-4,000[95] – crossed the border to assist the Poonch rebels in late September/early October 1947. In September the Jammu and Kashmir government accused the government of Pakistan of withholding essential supplies of petrol, oils, food, salt and cloth, leading to the charge that Pakistan sought to compel the Dogra Kingdom into joining Pakistan by means of an economic embargo coupled with a tribal invasion.[96] Some writers have gone further and claimed that the tribesmen were really Pakistani regular troops in disguise.[97] Others claim that reports of the massacre of Muslims coupled with sentiments of Muslim solidarity and the promise of loot and plunder would have been sufficient to persuade the tribesmen to cross the border.

Similarly the complicity of the Pakistani government is also subject to dispute. Some argue that the Pakistani government gave the tribesmen weapons and encouraged them to cross the border. Others maintain that at the very least, because of the number of invaders and the logistics involved in transporting them from the NWFP, the Pakistani government must have been aware of what was happening, made no effort to stop it, and was therefore guilty of providing tacit consent, if not assistance.[98] Pakistan,

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[94] In the early nineteenth century Ranjit Singh had rewarded Dhian Singh with the *jagir* of Poonch. The claim that the Poonch *jagir* was under the sovereignty of the Dogra State, and not a separate princely State under paramountcy, had been successfully established by Hari Singh through legal action in the 1930's (refer Hewitt, p.74). When Poonchi soldiers, returning from World War Two, discovered that they were now subjects of Hari Singh – and thus required to pay his exorbitant rates of taxation – they rebelled. See Birdwood, p.49; Korbel, pp.54-55 and p.68; and Schofield, pp.133-35.

[95] No accurate figures are available, but this seems to be the generally accepted figure amongst scholars (see Lamb p. 133; and Hewitt, p.74). Birdwood, however, states that the initial tribal advance of 22 October consisted of 2,000 men (Birdwood, p.56).

[96] For example, see Hewitt, p.75.

[97] M. G. Chitkara, *Kashmir Imbroglio: Diagnosis and Remedy* (New Delhi: APH Publishing Corporation, 1996), p.4; Prem Shankar Jha, *Kashmir 1947: Rival Versions of History* (Delhi: Oxford University Press, 1996); and Major General Akbar Khan, *Raiders in Kashir* (Karachi: Pak Publishers, 1970).

[98] See Hewitt, p.75; and Birdwood, pp.54-55.

however, denied any involvement in the tribal incursions or that it was placing economic pressure on the State.[99]

On 18 October the government of Jammu and Kashmir warned Pakistan that if the situation did not improve; "[t]he government fully hope that you [Liaquat Ali Khan, the Prime Minister of Pakistan] would agree that it would be justified in asking for friendly assistance."[100] The tribal invaders continued their advance, overcoming local opposition and committing acts of violence on both Muslims and non-Muslims.[101] There is speculation that had the tribesmen foregone the pleasures of rape and looting then they could have captured Srinagar with relative ease. However, their lack of discipline resulted in crucial delays and a most unfortunate public image.

On 24 October the tribesmen captured the power station at Mohara, plunging Srinagar into darkness and causing mass panic,[102] while the Poonch rebels formally declared their independence from the Maharaja as the State of Azad (Free) Kashmir.[103] On the same day Jammu and Kashmir Deputy Prime Minister, R. L. Batra, was sent to Delhi to seek immediate military assistance and carried a signed letter of accession from the Maharaja.[104] This request was communicated to the *Indian Defence Committee* the following morning,[105] where it was decided that V. P. Menon of the *Indian States Department* would fly to Srinagar that day (25 October) to assess the situation. He returned to Delhi the following day (26 October) with Jammu and Kashmir's Prime

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[99] Pakistan claimed that supply lines between the State and Pakistan had been disturbed by communal violence – roads were blocked by fleeing refugees and lorry drivers, fearing for their safety, were reluctant to cross the border. See Sir Zafrulla Khan's statement before the UN Security Council, *Security Council Official Records*, Third Year, Nos 1-15, pp.101-103. Pakistan also claimed that the Poonch rebellion was an example of the Maharaja's attempts to stage situations which would have provided him with an excuse to ask for Indian military assistance, and thus secure the State's accession to India against the people's wishes. See Birdwood, pp.64-65.

[100] Lamb, pp.126-27; and Hewitt, p.75.

[101] See Sisir Gupta, *Kashmir: A Study in India-Pakistan Relations* (New Delhi: Asia Publishing House, 1967), p.111.

[102] Hewitt, p.76; Lamb, p.135; and Birdwood, p.57.

[103] Lamb, p.135.

[104] So states M. C. Mahajan in his autobiography, *Looking Back* (Bombay: Asia Publishing House, 1963), p.150. Lamb speculates that the signed Instrument of Accession was almost certainly *not* shown to the Indian leaders, as the Maharaja hoped to secure Indian military assistance without having to surrender his independence by acceding to India (Lamb, pp.134-35).

[105] Menon, p.397.

Minister, M. C. Mahajan.[106] That evening the Maharaja, fearing capture by the invaders, began a dash for the safety of Jammu over the Banihal Pass.[107]

The details and exact time of the State's alleged accession to India are subject to controversy. Mountbatten had insisted that it would be improper to move Indian troops into what was at the time an independent country, i.e. Indian forces could only be sent to the State if the Maharaja first acceded to India.[108] Mahajan reports that in order to obtain Indian military assistance he offered the State's accession to India at a meeting with Nehru, Sheik Abdullah and Sardar Patel[109] and flew to Jammu the following day (27 October) to obtain the Maharaja's signature on "formal documents."[110] However, Menon claims that he and Mahajan flew to Jammu on the 26 October where they obtained the Maharaja's signature on the final version of the Maharaja's letter to Mountbatten (which outlined the conditions under which he was offering accession) and the Instrument of Accession.[111]

On the morning of 27 October a massive airlift of Indian troops to Srinagar began just in time to save Srinagar.[112] The official Indian version of events is that the Maharaja acceded to India on 26 October.[113] However, Lamb points out that if Mahajan's account of events is true, then the Indian intervention occurred *before* the Instrument of

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[106] Menon, pp.397-99. Also see Mahajan, p.151.

[107] Menon, p.398.

[108] Menon, p.399.

[109] Indian Deputy Prime Minister and *Minister for States*.

[110] Mahajan, p.154.

[111] See Menon, pp.399-400; and Alan Campbell-Johnson, *Mission with Mountbatten* (New York: E. P. Dutton & Co, 1953), p.224.

[112] Note that General Sir Frank Messervy (commander-in-chief of the Pakistan Army from 15 August 1947 to 15 February 1948) alleged that India had planned to militarily intervene in the State several weeks before the event (General Sir Frank Messervy, 'Kashmir', *Asiatic Review*, Vol.45, January 1949, p.469). Lamb also suggests that the logistics of the airlift would have required more preparation and time than the official Indian version of events allows, and so claims that Indian military intervention on such a scale must have been planned weeks in advance (Lamb, pp.140-41). Also see Pervaiz Iqbal Cheema, 'Pakistan, India and Kashmir: A Historical Review' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.96. Birdwood, on the other hand, denies this allegation and includes a statement by the commanders of the Indian military which denies any planning of military intervention in the State occurred prior to 25 October 1947. See Birdwood, p.59. Also see Korbel, pp.86-87.

[113] The published versions of both the Maharaja's letter to Mountbatten and the Instrument of Accession are dated 26 October 1947 (Menon, pp.399-400).

Accession was signed, and thus India was invading an independent country.[114] Other historians have, however, rejected Lamb's thesis.[115] The accession was further complicated by the introduction of the notion of a plebiscite to ratify the State's accession to India. Mountbatten, in accepting the State's accession, replied to the Maharaja:

> In consistence [*sic*] with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader the question of the State's accession should be settled by a reference to the people.[116]

This suggested that the State's accession was provisional and, being subject to ratification, might be reversed. The introduction of the notion of a plebiscite (which has never been held) and the controversy surrounding the legality of the Indian intervention – not to mention the fact that a sole individual (who was a Hindu) could decide the fate of millions of Muslims – has, over time, only added to the sense of historical grievance felt by the Muslims of the State.

Fighting continued between the Indian troops and what Pakistan now called the Government of Azad Kashmir. In May 1948, when the Indians began to advance towards the Pakistan border, approval was given for Pakistani regulars to be committed

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[114] See Lamb, pp.135-40. For a good summary of the events surrounding this controversy also see Schofield, pp.148-50.

[115] For example, see Hewitt, p.78; and Ganguly, p.11.

[116] See Lamb p.137; Hewitt, p.77; and Birdwood, p.214. On 27 October 1947 Nehru sent the following telegram to Liaquat Ali Khan – Prime Minister of Pakistan: "I should like to make it clear that the question of aiding Kashmir in this emergency is not designed in any way to influence the State to accede to India. Our view which we have repeatedly made public is that the question of accession in any disputed territory or State must be decided in accordance with the wishes of the people and we adhere to this view." Quoted in M. Ayub Khan, *Friends not Masters. A Political Autobiography* (London: Oxford University Press, 1967), p.242. Also see World Kashmir Freedom Movement, *U. N. Resolutions and India's Commitments on Kashmir* (London: World Kashmir Freedom Movement, 1993). Similarly, Nehru broadcast on All India Radio on 2 November 1947: "That pledge we have given, and the Maharaja has supported it not only to the people of Kashmir but the world. We will not, and cannot back out of it. We are prepared when peace and law and order have been established to have a referendum held under international auspices like the United Nations. We want it to be a fair and just reference to the people, and we shall accept their verdict. I can imagine no fairer and juster offer." See Lamb p.137; Hewitt, p.77; and Birdwood, p.214.

to the battle.[117] The war was ended by a cease-fire agreement which took effect on 1 January 1949. A cease-fire line was defined in a further agreement signed on 27 July 1949.[118] As a result the Dogra kingdom was divided with India occupying approximately two thirds of the State including the Valley, Ladakh and Jammu, while the Pakistanis held the areas of Mirpur, Poonch, Muzzafarabad (now known as Azad Kashmir) and the tribal areas of Gilgit and Skardu.[119]

5.4 POST-PARTITION JAMMU AND KASHMIR

A. United Nations Involvement

India first bought the Kashmir issue to the *United Nations* (UN) on 31 December 1947. India's case was based upon the legal validity of the Maharaja's accession and Pakistan's aid to the tribal invaders. Pakistan contested the validity of the Maharaja's accession and portrayed the situation as a popular revolt against an oppressive ruler. The UN Security Council resolutions of 13 August 1948 and 5 January 1949 called for a plebiscite to determine the State's final status, and required that both governments ought to take measures to ensure proper conditions for a free and impartial plebiscite by: (a) Pakistan first withdrawing from Azad Kashmir; followed by (b) India withdrawing the majority of its troops from Jammu and Kashmir.[120]

In 1948 the *United Nations Commission for India and Pakistan* (UNCIP) was established.[121] Numerous resolutions seeking a peaceful resolution to the conflict

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[117] Birdwood states the causes of Pakistani intervention as being a belief that the Indian advance constituted a threat to Pakistan's security, and the fact that hostilities had produced an increasing wave of Muslim refugees to cross into Pakistan (Birdwood, p.67). Korbel concurs with Birdwood and also points out that had India been allowed to seize all of Kashmir then it would been able to present the world the possession of Kashmir as a *fait accompli* thus closing the issue for good. Moreover, Indian possession of Kashmir would have placed Pakistan at a severe military and economic disadvantage (Korbel, pp.138-39).

[118] Lamb, pp.163-64; and Hewitt, p.79.

[119] Hewitt, p.79.

[120] Mutual suspicions between the two nations precluded the de-militarisation of the State. India refused to disclose the size and strength of her army in Kashmir, fearing that doing so would give Pakistan a military advantage. It should be noted that by this time the forces in Azad Kashmir had developed into a disciplined and effective fighting force. Moreover, once having withdrawn its forces from the State, India would face substantial difficulty in re-deploying them due to the mountainous terrain and the vast distances involved. This was in contrast with Pakistan which faced no such difficulties in deploying and supplying its army in the area (Korbel, pp.158-59).

[121] For a first-hand account of the Commission's work and the difficulties faced by it see Korbel.

were passed, and a number of reports commissioned; the two most significant being the *McNaughton Report* (1949) and the *Dixon Report* (1950).[122] However, an agreement between the two countries proved unachievable due to mutual suspicions and disagreements concerning the administration, supervision and structure of a plebiscite. Invariably both blamed the other's intransigence for the lack of a break-through.

B. The First Administration of Sheikh Abdullah

Abdullah, whom Nehru had repeatedly declared represented the true voice of the Kashmiri people, was declared head of an interim government by the Maharaja following the departure of Mahajan on 5 March 1948.[123] However India faced, and indeed continues to face, the problem of how to clarify the constitutional relationship between the State and the Indian Union. This was complicated by the provisional nature of the State's place in the Indian Union subject to its ratification by a plebiscite. Direct Indian administration could result in the charge that India was repudiating the UN and its promises to hold a plebiscite and that it was seeking to prejudice the outcome of any settlement of the issue.

India's constitution came into operation in 1950 and contained *Article 370* which governed the relationship between 'the centre' (i.e. the Indian Federal Government) and the State of Jammu and Kashmir. Article 370 gave the Indian national parliament substantive rights over Kashmir in only those three areas covered in the original Instrument of Accession, i.e. defence, foreign affairs and finance. The State was therefore able to legislate in matters denied to all other Indian States. Additionally, the State retained expressions such as "Prime Minister" (instead of Chief Minister) and *Sadar-i-Raiyasat* (instead of Governor), and was also allowed to display its own flag and other cultural symbolism.[124]

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[122] The Dixon report in particular is notable because it acknowledged that the former Dogra Kingdom was created by an imperial process and consisted of a series of regionally defined ethnic enclaves. The final version of the plan proposed that certain areas go to Pakistan, others to India and that a plebiscite be held in the Valley. This, like many of Dixon's proposals, was rejected by India, leading Dixon to question India's commitment to hold a free plebiscite in the State to ascertain the true wishes of its people. Refer *UN Security Council Document 1791* of 15 September 1950, pp.16-23.

[123] Lamb, p.185.

[124] Hewitt, p.140.

In 1949 the Maharaja handed over to his son, Yuvraj Karan Singh, as regent. In 1951 *The Jammu and Kashmir Legislative Assembly* was convened following elections the same year.[125] A few days later the Legislative Assembly ended the Dogra dynasty by stripping the Maharaja of all powers and replacing him with a constitutional Head of State (*Sadar-i-Riyasat*) elected by the Legislative Assembly.[126] In 1952 *The Delhi Agreement*, which attempted to clarify the relationship between the State and the Indian Union, was concluded. The Delhi Agreement affirmed the provisions contained within Article 370, thus further entrenching the State's privileged status within the Indian Federation.[127] Of the Delhi Agreement Abdullah commented, "...it is, of course, for the Constituent Assembly, which is seized of these matters, to determine the extent and scope of the State's accession to India."[128] This suggested that, regardless of the content of any agreements reached between the State and India, the nature of Kashmir's relationship with India was ultimately a matter for the State to decide.

C. Regional Imbalances & Hostilities

In 1950 Abdullah abolished the system of *jagir* through two pieces of legislation: *The Abolition of Big Landed Estates Act*; and *The Distressed Debtor's Relief Act*. The former confiscated all cultivable land greater than twenty-three acres and either distributed it to the land-less peasantry or converted it into State property. The latter created a board that instituted policies for the relief of mostly Muslim peasants, who were financially crippled by the debts they owed to their mostly Hindu landlords. These two pieces of legislation won Abdullah the loyalty of both lower and middle class Muslims and those Hindus who had suffered under the policies of the Maharaja.

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[125] The *Jammu and Kashmir Legislative Assembly* is also often referred to as *The Jammu and Kashmir Constituent Assembly*.

[126] See Korbel, pp.222-23. Yuvraj Karan Singh was the first such elected Head of State. See Lamb, p.186. Interestingly there appears to be no real support for re-instituting the reign of the Dogra dynasty as there is, say, in Russia where the Romonovs have, at least amongst some limited sections of society, enjoyed the support of a Czarist movement who favour the re-establishment of the Russian royal house.

[127] See for example Korbel, pp.224-25.

[128] Quoted in V. Bhushan, *State Politics and Government: Jammu and Kashmir* (Jammu: Tawi, 1985), pp.395-400.

but alienated the Jammu-based Hindu landed aristocracy who received no financial compensation for their losses.[129]

The Delhi Agreement combined with Abdullah's agrarian reforms to spark bloody protests in Jammu led by the *Praja Parishad*. The *Praja Parishad*, essentially a Hindu middle class movement founded by Balraj Madhok in 1947,[130] was symptomatic of the deep ethno-regional divisions within the State. It represented the views and interests of those Hindus, whose social and political aspirations had benefited to some degree from the rule of the Maharaja, but were not advanced by a change to a Muslim dominated government centred in Srinagar. The *Praja Parishad*, which had close links to Hindu bodies across India including the extremist *Rastriya Swayamsevak Sangh* (RSS)[131] and *Jana Sangh*, not only felt that Jammu was neglected by the Muslim dominated administration of Abdullah, but feared that the State was drifting towards independence or, even worse, Pakistan.[132] The two groups sought the abolition of Article 370 and the separation of Jammu from the Vale of Kashmir, and campaigned under the slogan, "Two constitutions, two flags, two Heads of State in one country will not be tolerated."[133]

D. The Fall of Abdullah and the Rise of the Government of Bakshi Ghulam Mohammed

It soon became apparent that Article 370 and the term 'accession' increasingly meant different things to different people. To New Delhi, Article 370 was a temporary measure which preceded the State's full and final integration within the Indian Union. However, Abdullah, who was beginning to doubt India's commitment to secularism, especially in view of the *Praja Parishad's* agitations in Jammu,[134] regarded Article

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[129] Ganguly, p.30. Also see Birdwood, p.169; and Joshi, pp.50-51.

[130] Bhattacharjea, p.186.

[131] Founded in 1925 by Dr K. B. Hedgewar, the RSS rejected the traditional, pacifist philosophy of Hinduism believing that it ill-equipped them to deal with what they saw as the increasing belligerency of India's Muslim minority. The RSS was a highly organised, militarist organisation responsible for numerous atrocities against Muslims (Korbel, p.52).

[132] Korbel, pp.226-28.

[133] Either as a separate State or as part of the Indian Punjab. See K. R. Malkani, 'Why Article 370 Must Go' in *Kashmir: From Autonomy to Azadi*, ed. G. M. Wani (Srinagar: Valley Book House, 1996).

[134] See for example, Kaul, pp.58-59; Schofield, pp.171-72 and pp.183-85; and Ashutosh Varshney,

370 as a permanent measure which did not preclude the possibility of the State one day becoming independent. For Abdullah accession to India did not indicate that the State was to be a part of India in perpetuity – it simply indicated that it wasn't a part of Pakistan and had yet to exercise its right to independence. Abdullah stated:

> Though the accession of Kashmir to India is complete in all aspects it is conditional and temporary in the sense that the people of the State have to ratify it. Therefore it is not final.[135]

Abdullah continued to embarrass Nehru by promoting the goal of Kashmiri independence both in public and private. Additionally, concerns were raised regarding the authoritarian nature of Abdullah's administration further souring Abdullah's relationship with New Delhi.[136] The death in police custody of *Jana Sangh* president, Dr Mookerjee, in Srinagar was the last straw.[137] On 8 August 1953, with the consent of Nehru, Sheikh Abdullah was dismissed as Prime Minister and replaced by Bakshi Ghulam Mohammed. Subsequently Abdullah was arrested and imprisoned leading to violent demonstrations in the Valley in which a number of people were killed.

Under Bakshi Ghulam Mohammed the State drifted back towards India, the National Conference slowly became a branch of the Indian Congress Party and the allegations of authoritarianism and corruption continued.[138] In February 1954 the Legislative Assembly confirmed the legality of the State's accession to India, while in 1957 it adopted a new constitution for the State which declared that the State "...is and shall be an integral part of the Union of India." It also placed the State within the

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'Three Comprised Nationalisms: Why Kashmir has been a Problem', in *Prespectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), pp.204-5. Varshney points out that Abdullah's public expressions of doubt regarding India's commitment to secularism and the State's final status simply added credibility to the *Praja Parishad's* claims that Abdullah was duplicitous and that Muslims were disloyal to India. Also see Korbel, pp.240-41.

[135] *The Hindustan Times*, 24 July 1953.

[136] Anxiety about Abdullah's style of government had first been advanced shortly after its inception in 1947. See Mahajan, pp.175-77. Also see Bazaz (1967), pp.64-65; and Korbel, pp.207-9. Note, however, that some writers have suggested that figures in Jammu and New Delhi had been conspiring for some time to oust Abdullah, and that many of the allegations of corruption and misgovernment directed towards Abdullah may have been part of a campaign of mis-information by such people (see, for example, Joshi, p.53 and pp.94-95).

[137] He apparently died of a heart attack. However, it was rumoured that he had been murdered, possibly on the orders of Abdullah. See Lamb, p.198.

[138] See Bazaz (1967), pp.69-70. Also see Karan Singh, *Autobiography* (Delhi: Oxford University Press, 1994); Mir Qasim, *My Life and Times* (New Delhi: Allied, 1992); and Joshi, p.55.

jurisdiction of the Indian Supreme Court, Controller and Auditor General. In 1964 Articles 356 and 357 of the Indian Constitution, which had hitherto been excluded by Article 370, were applied to Jammu and Kashmir.[139] Thus began the gradual diminishment of the State's independence from the centre. Elections were held in 1957 and 1962 which returned the National Conference to power.

By 1956 Nehru had fundamentally altered his view of the Kashmir issue and withdrew the offer of a plebiscite. Nehru cited three justifications for his action: (a) The Cold War and Pakistan's alignment to the West via the SEATO and CENTO treaties had drastically changed the objective situation; (b) Kashmir's Constituent Assembly had approved the State's merger with India and accepted the Indian constitution – thus satisfying the requirement that the State's final status be settled in accordance with the wishes of its people;[140] and (c) the UN Security Council resolution of 21 April 1948's requirement that Pakistan withdraw its troops from Azad Kashmir so that a plebiscite might be held, had not been satisfied.[141]

E. The 1965 & 1971 Indo-Pakistan Wars

On 26 December 1963 it was discovered that a sacred relic – a hair from the beard of the prophet Mohammed (the *Moe-i-Muqaddas*) – was missing from the Hazratbal shrine near Srinagar, resulting in enormous riots. It was widely believed that Bakshi Ghulam Mohammed was somehow responsible for the theft, and property belonging to him and his family was set alight.[142] The relic mysteriously reappeared on 3 January 1964 and calm was established following a special verification ceremony (*Deedar*) on 3 February 1964. Following the Hazratbal crisis Bakshi Ghulam Mohammed was removed from office and replaced by G. M Sadiq who was himself replaced by Syed Mir Qasim in 1971.

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[139] These two Articles enabled Indian Presidential rule to be instituted in the State and Indian legislation to come into effect in the State without prior approval by the State legislature respectively.

[140] Birdwood claims that in an interview with Nehru in 1955, Nehru stated that because most Kashmiris were illiterate and uneducated, they were thus incapable of understanding the issues at stake and making an informed decision on Kashmir's future. Thus, the prudent course of action would be for the people to elect an "intelligent" representative group to make the decision on their behalf. See Birdwood, p.191.

[141] See Varshney, p.215. Also see Verma, pp.44-45.

[142] There are numerous theories regarding the identity of those responsible for the relic's disappearance, the true identity of whom remains a mystery.

The violent demonstrations following the Hazratbal crisis and Abdullah's 1965 re-arrest after a brief spell of freedom, indicated to Pakistan that the Valley was ripe for a popular revolt against Indian rule. Additionally, the lack of diplomatic progress and the further incorporation of the State into the Indian Union, provoked a fear that India would soon declare the Kashmir issue closed.[143] In a radio broadcast in early 1964, Pakistani President Ayub Khan stated:

> This upheaval was set in motion by the mysterious theft of the holy relic from the Hazratbal shrine, which injured the religious susceptibilities not only of the Muslims of occupied Kashmir but also of Pakistan. Subsequent events have, however, shown that the agitation was due also to the resentment of the people of Jammu and Kashmir at the subjugation by India and the Indian design to integrate their State.[144]

Thus, Pakistan, having witnessed India's humiliating defeat by China in 1962, chose to seek a military solution to the Kashmir issue. Furthermore, following its procurement of advanced American military hardware by virtue of its membership of the CENTO and SEATO treaties, Pakistan was now militarily a match for India.

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[143] Cheema, p.105.

[144] Mohammed Ayub Khan, *Pakistan Perspectives* (Washington D. C.: Embassy of Pakistan, no date of publication), p.47.

TABLE 5.2. ORIGIN AND QUANTITY OF MILITARY HARDWARE POSSESSED BY INDIA AND PAKISTAN PRIOR TO THE 1965 INDO-PAKISTAN WAR[145]

United States	*India*	*Pakistan*
F86 Sabre Jets	0	100
F104 Starfighters	0	50
B87 Bombers	0	30
C130 Transports	0	4
C119 Transports	25	0
Patton Tanks	0	200
Sherman Tanks	30	0
Great Britain		
Viscount Transports	5	0
Hunter Jet Fighters	150	0
Vampire Jet Fighters	100	0
Gnat Jet Fighters	100	0
Canberra Bombers	80	50
Canberra Photo Planes	8	0
Centurion Tanks	210	0
Stuart Tanks	80	0
Soviet Union		
MIG 21 Jet Fighters	6	0
Ilyushin Transports	2	0
Antonov Transports	24	0
France		
Mystere IV Fighters	100	0
AMX13 Tanks	40	0

[145] *Newsweek*, 20 September 1965.

Following a series of border clashes in the Rann of Kutch sector in Gujarat, Pakistan launched *Operation Gibraltar*. Pakistani *Mujahideen* (freedom fighters) crossed the border in increasing numbers during the first half of 1965 to sabotage military targets, disrupt communications and foment rebellion amongst Kashmiris against the occupying Indian troops. By August Pakistani regulars had entered the conflict. The Indian response came on 14/15 August 1965 in the Kargil sector. On 1 September Pakistan launched a major attack in the Chhamb district advancing to within 20km of Jammu City in an attempt to cut the Indian lines of communication and supply to the State.[146] India responded by widening the conflict with an advance towards the Pakistani cities of Lahore, Sialkot and Karachi. The war ended with a cease-fire on 23 September 1965, and following the *Tashkent Conference* of 3-10 January 1966 both armies withdrew to their former positions. Pakistan had falsely assumed that: (a) the Kashmiris would rise up in popular rebellion against India (they instead actively assisted the Indian army in countering the Pakistani threat[147]); and (b) that the Indians would confine the fighting to Jammu and Kashmir.[148]

The third Indo-Pakistan war in 1971 began with a brutal crackdown in the capital of East Pakistan, Dacca (now Dhaka), in response to demands for increased autonomy.[149] This resulted in the deaths of several thousand East Pakistanis and a stream of close to ten million refugees crossing from East Pakistan into India placing a huge burden on that country.[150] After all attempts at a diplomatic solution failed, India openly came out in support of the *Mukti Bahini* rebels in East Pakistan in late November 1971. In response Pakistan attacked India on 3 December 1971 sparking a fourteen-day war.

Although the war was not fought directly over Kashmir, much of the fighting occurred there. Pakistani managed to capture Chhamb but lost some territory in the Kargil, Tithwal, Uri and Poonch areas of the State.[151] Elsewhere, India advanced into

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[146] See Lamb, p.262.

[147] See, for example, Bazaz (1967), pp.102-3. Although there is evidence that some Kashmiris supported and assisted the Mujahideen. See Schofield, p.207.

[148] Lamb, pp.259-60; and Gowher Rizvi, 'India, Pakistan and the Kashmir Problem 1947-72' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.70.

[149] Ganguly, p.58.

[150] See Ganguly, p.58.

[151] *The White Paper on the Jammu and Kashmir Dispute* (Islamabad: Government of Pakistan, 1977),

two sectors in the Punjab. Moreover, Pakistan lost its eastern wing which now became the independent State of Bangladesh, thus making India without a doubt the dominant power on the subcontinent. While Pakistan was now relieved of its previously burdensome responsibility of defending East Pakistan, the loss of its eastern wing dealt an enormous psychological, symbolic and material blow to the Pakistani State and substantially undermined its claim to Kashmir. Again, Ganguly explains:

> The Pakistani claim [to Kashmir], it will be recalled, was based on the state's predominantly Muslim population. Since Pakistan was unable to maintain its own integrity on the slender basis of religion, it could ill afford to make another religiously based claim on Kashmir. Thus, its ethnoreligious claim to Kashmir appeared all the more dubious after the 1971 civil war.[152]

On 2 July 1972 India and Pakistan concluded the *Simla Agreement* in which the two countries agreed to: (a) settle their differences through bilateral negotiations;[153] (b) settle their differences peacefully; (c) "respect each other's national unity, territorial integrity, political independence and sovereign equality"; and (d) respect the line of control (LoC) in Jammu and Kashmir resulting from the cease-fire of 17 December 1971, and refrain from seeking to alter it irrespective of mutual differences.

F. The Return of Abdullah

Recognising that the popular legitimacy of both the State government and the Indian position in Jammu and Kashmir were dependent upon the credibility of the leader of its government, in 1975 the Indian Prime Minister, Indira Gandhi, concluded the *Kashmir Accord* with Sheikh Abdullah. Abdullah, continued to command the greatest level of popular support in the Valley, and thus was the leader most likely to unite Kashmiris behind Indian rule. The State continued to be governed by Article 370, while Abdullah as governor ruled the State through the Congress Party, winning a second term in 1977 under the banner of a revived National Conference.

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pp.101-111.

[152] Ganguly, p.60.

[153] Thus ruling out appeal to a third party such as the UN and depriving the dispute of its international character. See A. G. Noorani, 'Betrayal of Kashmir: Pakistan's Duplicity and India's Complicity' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.257.

Like the Delhi Agreement of 1952, the 1975 Kashmir Accord prompted protests both in Jammu and Ladakh. In 1979-81 both regions were again the scene of demands for autonomy from the Valley and violent protests relating to allegations of discrimination by the government in Srinagar concerning matters such as the division of Federal Aid, employment in the Public Service and the concentration of professional/technical institutions and industrial plants in the Valley.[154] In Jammu and Ladakh such imbalances generated feelings of hostility and alienation which, due to the domination of each region by a different ethno-religious community, developed a communal dimension.[155] These regional imbalances were institutionalised through the State's representative institutions, i.e. the demographic dominance of the Valley meant that it contained the majority of the seats in the Legislative Assembly.

Both major political parties increasingly became identified with a different region in the State – the *Congress (I)* party with Hindu-majority Jammu, and the National Conference with the Muslim-majority valley. In the 1977 election, of the forty seven seats[156] won by Abdullah's National Conference only seven were from the Jammu region. This trend continued in the 1983 and 1987 elections. The following table demonstrates the ethno-regional identifications of different political parties in the State.

[154] See Reeta Chowdhari Tremblay, 'Jammu: Autonomy Within an Autonomous Kashmir' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), pp.155-57.

[155] Refer Verma, pp.36-38.

[156] Out of a possible total of seventy six seats.

TABLE 5.3. REGIONAL BREAKDOWN OF THE PERCENTAGE OF VALID VOTES WON BY DIFFERENT POLITICAL PARTIES IN THE 1983 AND 1987 ASSEMBLY ELECTIONS[157]

Parties	*1983:*		*1987:*	
	Jammu Region	*Kashmir Valley*	*Jammu Region*	*Kashmir Valley*
Congress (I)	45.30	19.08	37.24	8.96
National Conference	29.91	59.35	14.78	45.11
BJP	8.11	0.05	12.38	0.13
Jamaat-i-Islami/MUF	0.06	6.62	0.28	31.84
People's Conference	0.84	7.30	0.03	6.36
Others	1.50	0.16	12.73	0.59
Independents	14.66	7.41	22.56	8.09

G. The History of Electoral Mal/Practices in the State

Since the State's first election in 1951 to the present day, there have existed charges of electoral malpractice by the ruling party in order to ensure its return to power. These have included disqualification of opponents on flimsy/frivolous grounds, use of the government machinery in support of the ruling party, beatings and kidnappings of opposition candidates, intimidation of voters and tampering with ballot boxes.[158] One of the most disturbing features of 1951-72 State elections was the incidence of unopposed returns where the candidacy of opposition politicians was rejected – allegedly on spurious grounds – leaving only the ruling party's candidate to contest the electorate and thus eliminating any voter-choice.

[157] Verma, p.142.

[158] Bazaz (1967), p.87.

TABLE 5.4. UNOPPOSED RETURNS TO THE JAMMU AND KASHMIR STATE ASSEMBLY[159]

Year of Election	*Total number of seats contest-ed*	*Number of unoppo-sed returns*	*Percentage of unopposed returns to the total number of seats*	*Percentage of unopposed returns in the Kashmir Valley to the rest of the State*	*Proportion of unopposed returns in the Kashmir Valley to the total number of seats*
1951	75	73	97.33	58.90	100
1957	75	43	57.33	86.04	96.04
1962	75	34	45.33	97.05	74.41
1967	75	22	29.33	95.45	50.00
1972	75	5	6.66	80.00	7.14
1977	76	–	–	–	–
1983	76	–	–	–	–
1987	76	–	–	–	–

The National Conference dominated State politics and was itself dominated by a clique of ruling families who monopolised the best government jobs and controlled access to the most prestigious educational institutions.[160] Its hostility to the idea of any rival parties in the State retarded the growth of opposition parties, restricted popular opportunity to participate in the democratic process and prevented the development of a popular democratic culture.[161] Furthermore, it also removed any potential check upon the abuse of power by the ruling party, about which allegations were never in short supply. The following table illustrates the electoral performance of different parties in State elections:

[159] Verma, p.116.

[160] See Punjabi (1992), pp.42-43.

[161] See Bazaz (1967), pp.64-65; and Ganguly, p.29 and p.38. See Prem Nath Bazaz, *Democracy Through Intimidation and Terror* (New Delhi: Heritage Publishers, 1978) for a full account of the harsh nature of Abdullah's rule.

TABLE 5.5 PARTY-WISE PERFORMANCE IN ASSEMBLY ELECTIONS (1951-87)[162]

Year	*Congr-ess Party*	*National Confe-rence*	*Praja Parish-ad/Jana Sangh/ BJP*	*Janata Party*	*Jamaat-i-Islami/ MUF*	*Other minor parties*	*Indepe-ndents*
1951	–	75 Unopp-osed	–	–	–	–	–
1957	–	68 (56.22)	5 (24.11)	–	–	–	–
1962	–	70 (66.96)	3 (17.47)	–	–	0 (8.14)	2 (7.43)
1967	61 (53.2)	–	3 (16.45)	–	–	8 (21.44)	3 (9.09)
1972	58 (55.44)	–	3 (9.85)	–	5 (7.18)	– (0.78)	9 (26.75)
1977	11 (16.89)	47 (46.22)	-	13 (23.72)	1 (3.59)	0 (0.11)	4 (9.47)
1983	26 (30.32)	46 (47.29)	– (3.19)	– (0.28)	– (3.88)	1 (4.98)	2 (10.06)
1987	26 (20.20)	40 (32.98)	2 (5.10)	0 (0.43)	4 (18.20)	– (8.71)	4 (14.38)

NB: Figures in brackets indicate the State-wide percentage of the vote won by each party.

H. The Gradual Rise of Islamic Fundamentalism

It will be remembered that historically Islam was not a major determinant in the political mobilisation of Kashmiris. The peaceful conversion of Kashmiris to an

[162] Election Department of Jammu and Kashmir, quoted in Verma, p.145.

eclectic, meditative brand of Islam, combined with the Valley's geographical isolation and long-standing presence of a Hindu minority, to produce a brand of Islam that had little in common with the various other branches of Islam in the region.[163] The dominant feature of Kashmiri social life remained a shared sense of cultural identity, which encompassed all of the Valley's inhabitants regardless of religious affiliation. Additionally, because Kashmiris have traditionally been ruled by outsiders and consequently barred from serving in the military, they lack the martial history which characterises many people of the region. Thus, Kashmiri history has in many ways been characterised by religious and ethnic tolerance, and the Kashmiri eulogised as naturally secular and non-belligerent in nature. In the nineteenth century Sir Walter Lawrence wrote:

> The Sunny [Sunni] Mussalmans (ninety five per cent of the population) do not strike me as zealous or earnest in the profession of their faith, and except in their quarrels with Shiahs, they seem free from all forms of fanaticism. It is true that they observe very strictly the fast of Ramzan, but they do keep Friday as a day of rest, and very few Kashmiris make the pilgrimage to Mecca...Holy men from Arabia have spoken to me with contempt of the feeble flame of Islam which burns in Kashmir and the local Muslims talk with indignation of the apathy of the people.[164]

Geographically isolated from the rest of the region, Kashmiri Islam was largely separated from the larger currents of Muslim politics in India. "Except on particular occasions, Muslims elsewhere in India rarely joined in common cause with their fellows in the Valley. In turn, the Muslims of the Valley never developed extensive ties with Muslim communities in the rest of India. As a consequence they did not air their grievances as part of the national community but as a regional sub-community, with particular, parochial concerns."[165] Thus, while Islam was the dominant religion in Kashmir, it was generally an accommodating social force which, by-and-large, was not a barrier to the region's integration within a larger political unit populated predominantly by non-Muslims.

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[163] G. M. D. Sufi, *Islamic Culture in Kashmir* (New Delhi: Light and Life, 1979).
[164] Sir Walter Lawrence, quoted in Tavleen Singh, p.8.
[165] Ganguly, p.40.

By the 1983 elections things had, however, begun to change. Following the death of Abdullah in 1982, his son Farooq Abdullah – the new head of the National Conference and Chief Minister of the State – decided to compete head-to-head with Indira Gandhi's Congress (I) party. Throughout the election campaign Islamic political symbolism and rhetoric became increasingly apparent. Islamic fundamentalist groups such as the *Jamaat-i-Islami* held election rallies which attracted large crowds.[166] The importance of Article 370 and the need to maintain the State's independence from the centre became the central issues of the campaign. Farooq's success in reclaiming the heritage of his father and the National Conference regarding unjust central interference, and the appropriation of the campaign issues by the two main parties, succeeded in combating the Islamic lobby. Indira Gandhi campaigned successfully in Jammu, where she exploited feelings of alienation, neglect and injustice by the Hindu community towards the Muslim dominated administration in Srinagar,[167] however Farooq captured the Valley's constituencies and, thus, the government. Congress (I) maintained that the elections had been rigged by the National Conference. Mass meetings and demonstrations were organised by the Congress (I) to protest the election result which produced severe rioting in Srinagar.

Farooq's administration was short lived. On 2 July 1984 he was dismissed as Chief Minister by the State Governor, Jagmohan Malhotra.[168] It was widely believed that Farooq's downfall was part of a carefully orchestrated campaign by Indira Gandhi. There are allegations that the twelve defecting National Conference members received large sums of money to defect[169] and that Jagmohan, a trusted aide to Indira Gandhi, was appointed to the position of Governor on 26 April 1984 with the aim of toppling Farooq.[170]

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[166] For a first hand account of the election see Tavleen Singh, pp.34-49.

[167] See Varshney, p.219; and Tavleen Singh, pp.24-43. Singh also explains that a contributory factor in Indira's lack of electoral success in the Valley was the fact that she spoke only Urdu and not Kashmiri. Conversely, outside of Srinagar many rural Kashmiris could understand only Kashmiri and spoke no Urdu. Thus, many of those Kashmiris in rural localities who did attend her campaign rallies were unable to understand a word she said. See Tavleen Singh, pp.34-5.

[168] Farooq's parliamentary majority had been destroyed by the defection of twelve National Conference members of the Legislative Assembly and an independent to the Congress (I).

[169] See Hewitt, p.150; and Tavleen Singh, pp.52-53.

[170] Jagmohan had demonstrated both his ability and loyalty to Indira Gandhi as Lieutenant-Governor of Delhi. He developed a reputation for being both efficient and anti-Muslim due to his role in overseeing the demolishment of a primarily Muslim ghetto in the Turkman Gate area of Delhi in which a number of

> It was Mrs Gandhi who through her accord with Sheikh Abdullah in 1974, started the process of restoring democracy in Kashmir, and it is she who has now ended it. Nobody in the valley has any illusions that the governor was not acting on the instructions of Delhi and that he was only doing the job that he was sent on here [*sic*].[171]

Indira Gandhi's commitment to strong central government and suspicion of non-Congress (I) State administrations had brought her into conflict with several States. Farooq had openly supported the Chief Minister of Andhra Pradesh, N. T. Rama Rao,[172] and had criticised the central government's propensity to arbitrarily dismiss legitimately elected State governments. Additionally, Farooq's emphasis upon Article 370 during the 1983 election campaign and the shouting of anti-Indian slogans by members of the Jamaat-i-Islami at an India-West Indies cricket match in Srinagar are also cited as factors which led Indira Gandhi to the conclusion that Farooq's government had to go.[173]

The State government was now headed by Farooq's bother-in-law, G. M. Shah, who had unsuccessfully bid for the leadership of the National Conference following Sheikh Abdullah's death. Despite the pre-emptive stationing of troops in the Valley, Farooq's dismissal produced considerable tension and protest. The arbitrary dismissal of a popularly elected government, and its replacement by an administration widely considered to be incompetent and corrupt, caused a break-down in law and order. Of the first ninety-two days of G. M. Shah's administration seventy-two were spent under curfew.[174]

Unable to stem the rising violence G. M. Shah lost his parliamentary majority whereupon Jagmohan announced the suspension of the Legislative assembly and the

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people were killed (Tavleen Singh, pp.54-55; and Lamb, p.329).

[171] *The Telegraph*, Calcutta, 11 July 1984.

[172] Who had embarrassingly defeated Congress (I) in 1983 (Schofield, p.225).

[173] See Tavleen Singh, pp.49-51; and Lamb, p.329. Publicly Farooq's dismissal was rather unconvincingly justified by claims that Farooq had: (a) consorted with and encouraged secessionist forces within the State; (b) permitted Sikh terrorists to train in Kashmir; and (c) met with the charismatic and violent Sikh extremist Sant Jarnail Singh Bhindranwale. For a full account of the official reasons for Farooq's dismissal see Jagmohan, *My Frozen Turbulence in Kashmir* (New Delhi: Allied, 1991). Most writers dismiss Jagmohan's justifications for the sacking of Farooq as flimsy and specious. See, for example, Ganguly, pp.87-88.

[174] Tavleen Singh, p.83; and Ganguly, p.88.

imposition of Governor's rule in March 1986. In September 1986 Governor's rule was replaced by direct State rule from New Delhi. In November 1986, following an accord between Farooq Abdullah and Rajiv Gandhi[175] designed to counter the rise of violence and Islamic fundamentalism in the State, direct rule came to an end, the suspension of the Legislative Assembly was lifted and Farooq installed as the Chief Minister heading a Congress (I)-National Conference coalition. Elections were held in March 1987 in which the National Conference allied with the Congress (I) to battle against a broad alliance of Islamic fundamentalist groups known as the *Muslim United Front* (MUF).

The 1987 election is seen by many to have been the most rigged and unfair in the State's history.[176] It was preceded by the mass arrests of MUF leaders and election agents prior to the poll. Even allowing for the discrepancy created by a First Past the Post electoral system, the outcome was viewed by many as being grossly disproportionate to campaign rally attendances and the general mood in the Valley. Rightly or wrongly, many Kashmiris concluded that New Delhi had disregarded democratic procedures in order to cheat the MUF out of its rightful political inheritance.[177] The 1987 elections were followed by a series of communal riots in various parts of the State and a continuing break-down in law and order. By late 1988 groups of armed rebels, known as militants, were demanding the secession of the State from India and engaged in a violent battle with Indian security forces. This resulted in the mass exodus of Pandits from the Valley and the re-imposition of Governor's rule in January 1990.[178] In May 1990 Jagmohan was replaced as Governor by Girish Chandra Saxena who continued the harsh measures initiated by Jagmohan in an attempt to halt the insurgency,[179] and was himself replaced by General Krishna Rao on 11 March 1993.[180]

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[175] Rajiv Gandhi succeeded his mother, Indira, following her assassination by Sikh body guards in 1984.

[176] See Hewitt, p.152; Lamb, p.331; Tavleen Singh, pp.95-104; Ganguly, p.98; and Bhattacharjea, pp.253-54.

[177] See Sumit Ganguly, 'The Prospects of War and Peace in Kashmir' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.357; Bhattacharjea, p.253; and Fernandes, p.288.

[178] Some have alleged that the exodus of Pandits was deliberately orchestrated by India in an attempt to communalise the Kashmir dispute and paint the militants as Pakistan-sponsored Islamic fundamentalists. Author interviews with Prof. Abdul Ghani Bhatt (Chairman of the *Muslim Conference*), Srinagar, 25 November 1998; and Yasin Malik (JKLF Chairman), Srinagar, 26 November 1998.

[179] An example of Saxena's style of government is the *Kashmir Disturbed Areas Act* of 5 July 1990. This act authorised any magistrate or police officer above the rank of sub-inspector, to use force even to the extent of causing death without permission from higher authorities. See Ganguly (1997), p.112; and

5.5 THE CURRENT SITUATION IN KASHMIR

The various militant groups can generally be categorised according to two ideological variables: (a) those that favour the creation of an independent State versus those that favour joining Pakistan; and (b) those that favour the creation of a secular State versus those that prefer an Islamic State. Those groups which favour joining Pakistan tend to espouse a more fundamentalist brand of Islam. The first wave of militancy from 1988-89 through to 1990/91 was very much an urban, middle-class affair dominated by the secular, pro-independence *Jammu and Kashmir Liberation Front* (JKLF).[181] Much of the fighting was concentrated in Srinagar[182] and most of the militants were unemployed university graduates who had campaigned for the MUF in the 1987 election. Rarely did the militants engage the security forces for sustained periods of time, preferring instead hit-and-run tactics and the use of mines, booby traps and bombs. Frequently the security forces were engaged in urban settings to maximise the loss of innocent lives when they returned fire, and thus further alienate the population from the Indian army.[183] The militants also attempted to disrupt daily life by destroying bridges, shops, schools and government buildings.[184]

Gradually the number of militant groups began to increase with the JKLF losing its position of dominance to the Islamist, pro-Pakistan *Hizbul-Mujahideen*. The rise of Islamic, pro-Pakistan groups is frequently associated with a shift to a more rural-based militancy.[185] While the reasons behind this shift in militancy towards the countryside is still a matter of scholarly debate, some theorists maintain that the initial reluctance of rural Kashmiris to join militant groups may be attributed to a residual sense of loyalty towards the National Conference because of Abdullah's 1950's land

Schofield, p.265.

[180] Ganguly (1997), p.117.

[181] Schofield, p.240.

[182] And also certain rural centres such as Anantnag (since re-named Islamabad), Baramulla and Kupwara.

[183] G. Fernandes, 'India's Policies in Kashmir: An Assessment and a Discourse' in *Prespectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.289.

[184] Government of India, Ministry of Home Affairs, *Profile of Terrorist Violence in Jammu and Kashmir*, 1994, p.98. Also see M. L. Kotru, *The Kashmir Story*, Ministry of External Affairs, Government of India, p.50, no date of publication.

[185] Roger Howard, 'Evolving Rather than Receding, the Killing in Kashmir Continues', *Jane's Intelligence Review*, Vol.11, No.1, 1999, p.40.

reforms.[186] Just why rural militancy, when it did take hold, had such an Islamic flavour to it requires a more complicated explanation than can be provided here. However, it is worth pointing out that fundamentalist Islam in Kashmir *has* historically tended to be a rural phenomenon.[187]

As the number of militant groups continued to grow, clashes between ideologically opposed militant outfits became more common and many foreign *Mujahideen* from places such as Afghanistan, Bahrain and Sudan also began to enter the Valley.[188] The Islamisation and internationalisation of militancy in Kashmir was also accompanied by its criminalisation.[189] Initially the militants enjoyed wide popular support, however as people became increasingly war-weary from the steadily mounting number of casualties[190] this support gradually began to evaporate. Consequently, the militants were forced to resort to tactics such as kidnapping to extort money and food from the local population.[191] This, however, only further alienated the militants from common Kashmiris and initiated a vicious cycle of increasing resentment and violence.

In addition to gangsters masquerading as militants to extort money, *bona fide* militant groups also stepped into the vacuum left by the breakdown of civil order becoming a *de facto* police force motivated, not by a sense of civic duty, but rather a desire to enrich themselves at others' expense. Consequently, many of the violent acts

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[186] Author interview, Dr Amitab Mattoo (professor of international relations at *Jawaharlal Nehru University*), New Delhi, 9 November 1998.

[187] e.g. most *madrassas* (Islamic schools) tend to be located in rural areas.

[188] *Times of India*, New Delhi, 23 July 1993. Additionally, Iran has also been accused by Farooq of funding schools run by the *Jamaat-i-Islami* in Kashmir. See *Greater Kashmir*, 13 October 1999.

[189] See, for example, Schofield, pp.267-68.

[190] There have been countless documented cases of torture, rape and extra-judicial killings by the Indian security forces. For example, see Amnesty International, *India, Torture and Deaths in Custody in Jammu and Kashmir* (New York: Amnesty International, 1995). Also see Asia Watch and Physicians for Human Rights, *The Human Rights Crisis in Kashmir: A Pattern of Impunity* (New York: Asia Watch, 1993). Indian apologists claim that such allegations are usually false or grossly exaggerated and point out that the militants themselves are guilty of the same crimes. See, for example, D. P. Kumar, *Kashmir: Pakistan's Proxy War* (New Delhi: Har Anand Publishers, no date of publication), p.136. That both sides of the conflict are guilty of human rights abuses is undeniable, as is the fact that most victims of the violence are innocent civilians. Various estimates of the number killed since 1989 range from twenty thousand to fifty thousand, while some two hundred thousand, mostly Hindu, Kashmiris have fled the Valley and live as refugees in Jammu and elsewhere in India. See Robert G. Wisering, *India, Pakistan and the Kashmir Dispute: On Regional Conflict and its Resolution* (New York: St Martins, 1994), p.126.

[191] Ganguly (1997), p.139. Also see Harinder Baweja, 'The Hostage Crisis' *India Today*, 15 September 1995, pp.19-25.

perpetrated by militants were not ideologically motivated, but were instead a result of the militants being employed as a type of 'rent-a-gang' to settle, amongst other things, marriage and property disputes.[192] Given that official channels of dispute-resolution such as the courts were, even in the best of times, hopelessly inefficient, corrupt and over-burdened, it is hardly surprising that many people looked to the militants to provide a 'quick fix' to their personal disputes.[193]

India's response is based upon its counter-insurgency experiences in Punjab, Assam and Nagaland. It involves persistent cordon and search operations where neighbourhoods are cordoned off, houses searched and identity parades held. This is combined with counter-intelligence operations[194] and attempts seal off the LoC to halt Pakistani infiltration.[195] Estimates of the number of Indian military and para-military personnel in the State vary from two hundred thousand to five hundred thousand.[196] In 1995 the Indian government was responsible for the creation of several locally-based counter-insurgency movements known as *Ikhwan*. *Ikhwan* are mostly former militants who have been 'turned' and are provided with weapons, money and protection by the

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[192] For an account of the relationship between ideological factors, local issues and personal disputes as motivating forces behind militancy see Praveen Swami, *The Kargil War* (New Delhi: Left Word, 1999), p.84. There have also been reports of the local police disguising themselves as militants in order to settle personal scores. For example, the local press recently reported the case of a police officer who staged a fake encounter in Poonch in order to kill a subordinate officer. See *The Kashmir Times*, 23 August 1999.

[193] Another example of an event which alienated many people from the militants is the Hazratbal siege of October 1993 when a group of insurgents armed with light machine guns managed to occupy the Hazratbal mosque in Srinagar, which continues to house that most important of holy relics the *Moe-i-Muqaddas*. 'Army units laid siege to the mosque and negotiations between the two parties commenced. The grave significance of this stand-off cannot have been lost on any of the parties involved. Both the shrine and the relic which houses it are of enormous significance to Muslims in Kashmir and around the world, while the severe riots of 1963-64 sparked by the relic's disappearance had reached as far as Calcutta and were not easily forgotten. Additionally, the similarities between the Hazratbal siege and that of the Golden Temple in Amritsar by the Indian army in 1984 (which preceded the bloody war in the Punjab and the assassination of Indira Gandhi) fired the imagination of Kashmiris. Eventually a negotiated settlement was reached, which saw the militants being allowed to escape after leaving their weapons behind in the shrine. See Ganguly (1997) and Amit Baruah, 'Advantage Nobody', *The Hindu*, 28 November 1993, p.4. However many Kashmiris viewed the settlement of the Hazratbal siege as a lost opportunity, and a 'sell-out' by the militants to the occupying Indian army. Author interview with JKLF Area Commander, Srinagar, May 1994.

[194] e.g. the use of informants and attempts to infiltrate militant groups. The government also made wide (mis)use of the 1985 *Terrorist and Disruptive Activities (TADA) Act* which granted the government powers of preventive detention.

[195] See Hewitt, p.161; and Maroof Raza, 'Pakistan-Sponsored Insurgency in Kashmir: A Case Study', *Asian Journal on Terrorism and Internal Conflicts*, Vol.2, No.4, 1999.

[196] A respectable estimate is four hundred thousand. See Anthony Davis, 'The Conflict in Kashmir', *Jane's Intelligence Review* 7:1 (1995), p.40.

government.[197] At best the various *Ikhwan* are a local militia, at worst they are State-sponsored vigilantes with *carte blanche* to do as they please.[198]

Whereas the burden of counter-insurgency operations initially fell upon federal military and para-military forces,[199] their place has now largely been taken by the local State police (JKP).[200] In many respects the JKP's campaign against the militants has proven to be a qualified success.[201] While those areas that border on, or are proximate to, Pakistan[202] continue to be the scene of acts of violence, there has been a significant decrease in militant activity with most acts of militancy now confined to locations outside the Valley such as Doda, Rajouri and Poonch.[203] At the same time, official statistics – which must be treated with some caution – indicate that the proportion of militants who are of foreign origin has dramatically increased.[204] While Indian claims

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[197] See Ganguly (1997), p.153. Also see Harinder Baweja and Ramesh Vinayak, 'A Dangerous Liason', *India Today*, 15 March 1996, pp.52-55; and Human Rights Watch, 'India's Secret Army in Kashmir: New Patterns of Abuse Emerge in the Conflict', *Human Rights Watch Asia Report*, Vol.8, No.4, May 1996.

[198] The *Ikhwan* have also been implicated in the killing of numerous National Conference activists in Kashmir. Shortly after his return to power in 1996 Farooq launched a campaign against the *Ikhwan* by removing several privileges (including security) which were afforded to them while the State was under direct rule from New Delhi. Some commentators have claimed that the Ikhwan have attempted to exact revenge by killing National Conference activists in Kashmir. See M. L. Kak, 'CM Suspects Central Agencies', *The Tribune*, 18 December 1998.

[199] e.g. such as the *Border Security Force* (BSF) and the *Central Reserve Police Force* (CRPF).

[200] There remains, however, a high concentration of military forces in the State who, particularly the notorious *Rashtriya Rifles* (RR), are frequently used for counter-insurgency operations.

[201] Although to what extent factors other than the JKP's military prowess (e.g. a lack of popular support from ordinary Kashmiris) has been responsible for the decline in militancy is, of course, a moot point. There have also been reports of the JKP staging fake encounters in order to increase their prestige and chances of promotion (see, for example, 'High Drama on NH, Kathua', *The Kashmir Times*, 17 August 1999). It should also be pointed out that the various forces fighting the militants on India's behalf are far from a united force, and there have been numerous reports of clashes between the JKP and the BSF (e.g. refer 'JK Police Has Become a Vibrant Force', *The Kashmir Times*, 16 April 1999; and Raza, p.44).

[202] e.g. Poonch, Baramulla and Kupwara.

[203] Reasons given for why the militants have chosen to now focus upon this area of the State include: (a) that it is an attempt to open a new corridor from Pakistan into Kashmir; (b) the mountainous terrain offers the militants a strategic advantage over the Indian forces; and (c) it is an attempt to forment religious violence between the evenly balanced Hindu and Muslim communities in the region. Author interviews with Sarah Tiffin (First Secretary, British High Commission), New Delhi, 6 November 1998; Harinder Baweja (Senior Correspondent, *India Today*), New Delhi, 6 November 1998; and Chaman Lal Gupta (BJP Member of federal Parliament), Jammu, 12 November 1998. Also see Raza, p.45; and Swami, pp.65ff. Similar reasons were given for the 1999 incursion by Pakistan-sponsored *Mujahideen* in the Kargil sector. See Iftikhar Gilani, 'Kargil Operations May Take Longer than Expected', *The Kashmir Times*, 2 June 1999.

[204] In 1998 forty seven percent of militants killed by the Indian forces were reported to have been of foreign origin. This is compared to thirty one percent in 1997, twenty one percent in 1996 and six percent in 1996. See '45 Foreign Militants Killed in 1999', *The Kashmir Times*, 15 April 1999. Also see *Mercenary Assault on Kashmir* (Government of India); *Profile of Terrorist Violence in Jammu and*

of a return to normalcy in Kashmir are clearly a gross exaggeration, there can be no doubt that the situation *has* improved from, say, the early 1990's. This is not to deny that political violence in the State remains a serious problem,[205] however circumstances have improved to the extent that Kashmiris are at least able to conduct their daily affairs in a manner which would have been unthinkable in the not-so-distant past.

The nature and make up of the militant groups has also changed. While the *Hizb-ul-Mujahideen* remain active other, Islamic groups based in Pakistan such as *Lashkar-e-Toiba*, *Tehrik-ul-Jihad* and *Harkut-ul-Mujahideen*[206] are arguably now the dominant militant groups operating in Kashmir.[207] Consequently, what started out as a popular, indigenous rebellion against Indian authority has increasingly been transformed into a largely unpopular, foreign-sponsored and controlled phenomenon.

While Pakistan claims that it provides only moral and diplomatic support to the Kashmiri militants there is considerable evidence to suggest otherwise.[208] India repeatedly claims that Pakistan arms, funds and trains Kashmiri militant groups, relying in large part upon the sophisticated weaponry which entered Pakistan following the 1979 Soviet invasion of Afghanistan, and its experience in training the Afghan *Mujahideen*.[209] While an in-depth analysis of the case for Pakistani complicity is clearly beyond the scope of this thesis, it should be noted that there *is* an overwhelming consensus – not just within India – of substantial Pakistani involvement in Kashmir.[210]

Kashmir (Ministry of Home Affairs, Government of India, December 1994); *Profile of Terrorist Violence in Jammu and Kashmir* (Ministry of Home Affairs, Government of India, September 1997); and *The Proxy War Continues* (Government of India, no further publication details given).

[205] For a critique of the effectiveness of India's counter-insurgency strategy in Jammu and Kashmir see Swami, pp.74ff.

[206] Formerly known as *Harkut-ul-Ansar*. See Howard, pp.41-42.

[207] See 'LeT Takes Overall Control of Militancy', *The Kashmir Times*, 24 August 1999. The JKLF – which, true to form, is divided into at least 2 main factions – in May 1994 declared a cease-fire with the Indian government following the release from an Indian jail of one of its leaders, Yasin Malik (Schofield, p.268).

[208] The evidence that India has produced to corroborate these claims is hotly contested by Pakistan and sometimes inconclusive, consisting of such things as 'confessions' by individuals caught crossing the border to/from Pakistan, or arms seizures.

[209] Thomas, p.27; and Bhattacharjea, pp.17-18.

[210] e.g. refer 'Asia Overview' in *Patterns of Global Terrorism: 1998* (Washington D.C: United States State Department, April 1999). The case for Pakistani complicity in Kashmir was strengthened by that country's involvement in the 1999 *Kargil Crisis* when Pakistani sponsored Mujahideen and regular troops

Both the nature and extent of this involvement has no doubt changed over time to reflect the political, military, social and economic realities and upheavals in both countries. However, while Pakistan's role in sponsoring militancy in Kashmir may have initially been restricted to aiding and exacerbating an already existing problem in Kashmir, the lack of popular support amongst ordinary Kashmiris for the militants, combined with the dominance of pro-Pakistan groups and foreign mercenaries, would appear to indicate that Pakistani interference is now one of the primary causes of the residual violence in Kashmir.[211]

In addition to Pakistani interference, other factors cited as being responsible for militancy in Kashmir include a rise in levels of literacy and education[212] which, it is claimed, produced a politically sophisticated and knowledgeable generation. Frustrated by a lack of jobs and outlets for democratic expression,[213] Kashmiri youth finally resorted to violence to overthrow a regime increasingly viewed as unresponsive, corrupt and nepotistic.[214] Other theorists emphasise Indian political mismanagement as being responsible for the crisis citing factors such as Farooq's 1985 dismissal and 1987 accord with Congress,[215] and also the popular belief that the 1987 election had

crossed the LoC to occupy parts of Indian-occupied Kashmir. For a summary of the Kargil Crisis see Afsir Karim, 'Pakistan's Aggression in Kashmir: 1999', *Asian Journal on Terrorism and Internal Conflicts*, Vol.2, No.4, 1999.

[211] For a summary of the Indian case regarding Pakistani complicity in the Kashmir rebellion refer to Kumar, pp.181ff.

[212] From 1971 to 1981 the overall literacy rate in Jammu and Kashmir grew by more than forty-three percent – the third fastest growth rate in India. Refer Afsir Karim and the Indian Defence Review Team, *Kashmir: The Troubled Frontiers* (New Delhi: Lancer, 1994), p.188 and p.250. Moreover the percentage of the State's population enrolled at University increased from 0.087 percent in 1950-51 to 0.414 percent in 1976-77. See Government of Jammu and Kashmir, Department of Planning and Development, Directorate of Evaluation and Statistics, *Digest of Statistics 1977-78*, Vol.2 (Srinagar: Government of Jammu and Kashmir, 1978). This rise of literacy levels and the number of students attending universities in the State was matched by a dramatic growth in the number of newspapers published in the State which, in the twenty-five years to 1991, had grown to two hundred and fifty four – an increase of four hundred and fifty per cent – while total newspaper circulation rose from 119,000 in 1982 to 369,000 in 1989. See *Mass Media in India* (New Delhi: Publications Division, Ministry of Information and Broadcasting, Government of India).

[213] See Mustapha Kamal Pasha, 'Beyond the Two Nation Divide: Kashmir and Resurgent Islam' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), pp.371-72.

[214] See Ganguly (1997) for a full account of this explanation of the causes of the conflict.

[215] Historically when the National Conference and the Congress parties fought one another they did so bitterly, each party appropriating the main campaign issues in order to strengthen their relative positions. Consequently the performance of their communal rivals declined (Verma, p.151). It is claimed that his accord with Rajiv robbed Farooq of his father's role as a Kashmiri patriot standing up to New Delhi, thus creating a power vacuum and allowing the initiative against unjust central interference to slip to Islamic parties like the MUF.

been rigged by the ruling party.[216] Finally, it is also claimed that certain inter/national events[217] inspired Kashmiris in their struggle for freedom and Islamised Kashmiriyat.[218]

Whatever the causes of the violence in Kashmir, the response of any Indian government is constrained by the popularity of Hindu nationalism in that country, and a fear of being seen as soft on Pakistan, which would be electorally damaging and could provoke an anti-Muslim backlash.[219] This is particularly true of the current Hindu-nationalist *Bharatiya Janata Party* (BJP) administration in New Delhi which has links to fundamentalist Hindu organisations such as the RSS and *Jana Sangh*, and has consistently ruled out any return to Article 370 or the granting of any form of special status or autonomy to Kashmir. Indeed, as a result of its 1998 nuclear tests and resolute stand against Pakistan in the 1999 Kargil Crisis, the BJP has – notwithstanding its surrender to the demands made by the hijackers of an *Indian Airlines* flight in 1999 – staked its political credentials upon taking a hard line with Pakistan over Kashmir.[220]

Political developments within Kashmir have been similarly restrained. In an attempt to restore some degree of political normalcy, in May 1996 parliamentary elections for the federal lower house (*Lok Sabha*) were held for the first time in Jammu and Kashmir since 1989. Many commentators regarded the election result[221] as suspect

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[216] See for example, Bhattacharjea, p.253; and Hewitt, p.8.

[217] e.g. the overthrow of the Shah in Iran, the war in Afghanistan, militancy in the neighbouring State of Punjab, the break up of the USSR and the collapse of Communist regimes in Eastern Europe.

[218] See Bhattacharjea, pp.254-55; and Tavleen Singh, p.122.

[219] Tavleen Singh, p.239.

[220] Prior to the Kargil Crisis Indo-Pakistan relations had appeared to be warming with the signing of the so-called *Lahore Declaration* on 21 February 1999, in which both sides agreed to refrain from interfering in each other's affairs and to take steps to reduce the possibility of nuclear conflict on the Indian subcontinent. Aside from its affects upon Indo-Pakistan relations the Kargil Crisis also damaged Pakistan's relationship with the various groups opposed to Indian rule in Kashmir. For example, on 22 August 1999 the chairman of the *All Parties Hurriet Council* (APHC) severely criticised Pakistan's policy in Kashmir (see 'APHC Blasts Pak for Damaging Kashmir Cause', *The Kashmir Times*, 24 August 1999; and Zahir-Ud-Din, 'Hurriet's Love-Hate Relationship with Pakistan', *Greater Kashmir*, 21 July 1999) while similar remarks were also made by Amanullah Khan of the JKLF (see 'JKLF Threatens to Take Up Arms Against Pakistan', *The Kashmir Times*, 3 August 1999).

[221] Congress (I) secured four of the six seats with the other two going to the Janata Dal and BJP. Refer Ganguly (1997), p.152.

and blamed the relatively high voter turnout of forty percent[222] on coercion by the BSF and RR.[223] This was followed by local assembly elections in September of the same year which returned the National Conference under Farooq to power, winning fifty-seven of a possible eighty-seven seats.[224]

Since its re-election Farooq's government has had a mixed record of success in dealing with the State's many problems. On the one hand, the military situation has undoubtedly improved when compared to the early 1990's when the insurgency was at its peak.[225] On the other hand, however, the State remains hamstrung by the network of political patronage that has always existed under the National Conference and which is characterised by gross economic inefficiency, nepotism, corruption and incompetence.[226] Financially the State runs a considerable deficit[227] and is largely dependent upon handouts from the central government. Aside from mal-administration, the State's financial woes may also be attributed to a break-down in civil order and institutions[228] and a lack of investment in the State; all of which have contributed to alarmingly high levels of unemployment and few opportunities for

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[222] In contrast voter turnout for the last Lok Sabha elections held in the State in 1989 was a mere two percent. See Harinder Baweja, 'Exercise in Opportunism', *India Today*, 30 April 1996, pp.70-71.

[223] See, for example, Ganguly (1997), p.152; and Shiraz Sidhva, 'Guns and Votes', *Frontline*, 14 June 1996, pp.122-25. Others have, however, cast doubt upon these claims (e.g. Praveen Swami, 'Questions of Fact: A Critique of Reportage in the English-Language Press of the 1996 Kashmir Lok Sabha Elections', Unpublished Paper).

[224] Ganguly (1997), p.155. These elections have been followed by others which have also been subject to allegations of vote rigging and intimidation. For example, the 1999 Lok Sabha elections were compared to those of 1997 by some commentators who accused the ruling National Conference of massive vote rigging and the RR and JKP of voter intimidation. See *The Kashmir Times*, 16 September, 20 October and 5 October 1999. The final voter turnout in Kashmir in these elections was reported to be a mere twelve percent. See *The Kashmir Times*, 6 September 1999.

[225] The *Jammu and Kashmir State Minister for Industries and Commerce* (Mr Bodh Raj Bali) indicated that, from January 1998 to September 1999, 1,538 civilians, 87 police, 1,761 militants and 991 military personnel were either killed or wounded in Kashmir. See *Greater Kashmir*, 12 October 1999.

[226] The local press are full of stories of corruption and ineptitude amongst the State officials. For example on 17 November 1999 the local press reported that the State had apparently lost Rs300 Crore (one Crore is equivalent to ten million) due to excessive and fraudulent payments by the State Revenue Department in compensation for land claims. See 'Irregularities Detected in Land Compensation', *The Kashmir Times*, 17 November 1999. Similar claims were previously made against the Industries Department (refer 'Large Scale Irregular Appointments in Industries Department', *The Kashmir Times*, 26 October 1999) for misappropriation of funds and irregular appointments. Indeed, the entire State administration appears riven with ineptitude and corruption, with individual members of parliament also implicated in many shady financial transactions.

[227] Reported to be Rs142.08 Crore for the 1999-2000 budget. See *The Kashmir Times*, 5 March 1999.

[228] Which, apart from anything else, has damaged the government's ability to collect taxes.

Kashmiri youth.[229] Moreover, it is precisely these factors (i.e. unemployment and financial hardship) which have been officially recognised by the government of India as primary causes of militancy, both in Kashmir and elsewhere in India.[230]

The various secessionist groups have also attempted to get their political act together by forming an umbrella organisation known as the *All Parties Hurriet Conference* (APHC), which includes groups as diverse as the Yasin Malik faction of the JKLF and the *Jammat-i-Islami*. One of the main reasons behind the creation of the APHC was to counter the Indian claim that the large number and conflicting agendas of the various militant groups, made it extremely difficult for New Delhi to identify with whom they should negotiate. However, since the APHC's creation there has been little meaningful dialogue between it and the Indian government. The BJP government continues to refuse to consider any form of special autonomy for the State whereas the APHC, citing the corrupt nature of the electoral process in Kashmir, has consistently boycotted State elections and called upon ordinary Kashmiris to do the same.

While the rough and tumble nature of Kashmiri politics cannot be denied, the APHC's political fortunes have not been helped by the fact that it has yet to receive a clear political mandate from the electorate. Moreover, the divergent aims and aspirations of the various groups that together constitute the APHC, not to mention their frequent public squabbles and the quickly-acquired wealth of many of their leaders,[231] have combined to discredit the APHC in the eyes of many Kashmiris. This, combined with the National Conference's unpopularity due to its inability to deliver on promises of more schools, roads, hospitals and jobs, has tended to create something of

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[229] An education is no guarantee of finding employment: in 1998 there were reported to be 12,156 unemployed graduates in Jammu and Kashmir. See 'Unemployment Assuming Alarming Proportions', *The Daily Excelsior*, 18 December 1998.

[230] See, for example, S. S. Banyal, 'Ministry's Paper Blames Poor Governance for N-E Militancy', *The Hindustan Times*, 13 December 1998; Harinder Baweja, 'In the Mind of the Militant', *India Today*, 31 December 1994, pp.120-22; and 'Joblessness Will Push Youth into Militancy: BJP', *Greater Kashmir*, 17 December, 1999.

[231] Allegations of corruption and mis-appropriation of funds are, of course, hotly denied by APHC leaders who regard such claims as part of a campaign of mis-information by India designed to publicly discredit pro-secessionist groups. Author interviews with Yasin Malik (details above); and Mirwaiz Umar Farooq (pro-independence activist and spiritual leader), Srinagar, 28 November 1998.

a political vacuum in Kashmir with no one party being able to claim the overwhelming support of the people.[232]

In conclusion: the current situation in Kashmir may be described as one of economic, political and social stagnation. While levels of militancy have receded in comparison to earlier years, not only this has not been matched by a commensurate improvement in the socio-economic welfare of ordinary Kashmiris, but a political solution to the State's final status remains as elusive as ever. On the one hand, then, the decline in militancy is, at least to some degree, attributable to a lack of popular support for the militants and an overwhelming desire on the part of ordinary Kashmiris for a return to pre-1987 levels of normalcy. On the other hand, however, the fatigue of Kashmiris should not be interpreted as resignation to Indian rule but, rather, a realisation that the goal of *Azadi*[233] is unachievable through military means. Indeed, there remains an enormous amount of bitterness in Kashmir towards both India and Pakistan that will not be easily erased.

[232] In recognition of this fact a number of groups have begun to disassociate themselves from the APHC. For example, former Chief Minister G. M. Shah recently allied his pro-independence group the *Awami National Conference* with the separatist alliance of the *Quami Mushawart Council* which also includes the Amanullah Khan faction of the JKLF. See 'New Outfit Calls for Ceasefire', *The Kashmir Times*, 20 October 1999.

[233] i.e. freedom – whether it be in the form of an independent State or secession to Pakistan.

6

SECESSION AND KASHMIR

6.1 INTRODUCTION

Chapters Two, Three and Four of this thesis consisted of a process of critical engagement with Nationalist JC and LD theories of secession. The purpose of this chapter is to complete this process by analysing the three types of secession theory here under consideration – i.e. Nationalist, Just Cause (JC) and Liberal Democratic (LD) theories – with respect to the contemporary secessionist dispute in Kashmir. In order to accomplish this task the chapter will first detail the competing claims of the various Kashmiri secessionist groups as well as the counter-claims put forward by the Indian and Pakistani governments. These and other arguments will then be related back to the three types of normative theory in order to examine how the arguments advanced by those seeking the secession of Kashmir mirror Nationalist, JC and LD theories.

The second task of this chapter will be to apply these general critiques to the case of Kashmir. In other words, after having identified how Kashmir's secession might be, and frequently *is*, justified on, say, nationalist grounds, the critique of Nationalist theories of secession outlined in Chapter Two will then be applied to these claims. This same process will then be undertaken with respect to JC and LD theories of secession. The aim of this process is to corroborate the claims made in Chapters Two, Three and Four with empirical data by examining the linkages between these three theories and the case-study of Kashmir. The findings of this investigation will then be summarised in the following chapter along with a general summing-up of the thesis.

It might, at this point, be objected that to analyse these theories in terms of the case of Kashmir is to apply a Western sense of rationality to a situation which does not lend

itself to it. In other words, it is improper to apply theories written by Western intellectuals within a liberal-democratic context to a dispute in which the main protagonists are from a completely different philosophical tradition premised upon a completely different type of rationalism and (interpretation of) moral principles. Such an approach makes about as much sense as, say, taking an Islamic theory of secession based upon the teachings of the Koran and applying it to the secessionist dispute in Northern Ireland in which the main protagonists are not Muslims and so would reject a theory of secession based upon Islamic insights.

The aim, however, is not to use abstract normative principles to say something substantive about the conflict in Kashmir. Rather, the more modest goal is to use the example of Kashmir as illustrative material to substantiate the analytical investigation of the three normative theories being considered in this thesis. As was pointed out in the previous chapter this approach is entirely consistent with the material here under consideration and mirrors that taken by many other theorists. Furthermore, rightly or wrongly, the theories considered in this thesis are premised upon moral principles which are taken to be universal and so do not distinguish between secessionist disputes in which the various actors subscribe to Western, liberal-democratic norms and those in which they do not.

One may, of course, question the universality of moral principles and their interpretation. However, it would be highly inaccurate to describe all the protagonists in the Kashmir dispute as entirely ignorant of, or hostile to, Western, liberal-democratic norms. Furthermore, if the goal is to assess the satisfactoriness of these three theories then not only is it necessary to take certain fundamental precepts as given, but an internal critique premised upon factors which these theories regard as significant is likely to be more effective than one premised upon considerations which they would reject or consider questionable.

Finally, given that the protagonists in the Kashmir dispute are themselves from different religious and social traditions with a long history of conflict, they too are unlikely to agree upon particular moral principles, not to mention their interpretation and application in specific cases. Thus, the disparity between the principles employed

by these theories and those held by the various parties to the dispute over Kashmir, may be no less than that which already exists between these various protagonists in the first place. The alternative to accepting some level of disagreement over first principles is either to engage in the extreme relativism which characterises many *Postmodernist* thinkers, or attempt to secure unanimous agreement upon fundamental moral principles and their interpretation/application in specific instances. Not only is the latter approach likely to often be implausible, but the conclusions yielded by it are likely to be as unhelpful as those produced by the former approach which are, in the main, so general as to be practically useless.

6.2. ARGUMENTS FOR AND AGAINST KASHMIR'S SECESSION

A. The Claims of the Indian & Pakistani Governments

Kashmir is, first and foremost, the subject of a bilateral dispute between India and Pakistan. Furthermore, many of the factors cited by both India and Pakistan in support of their respective stances on Kashmir are relevant to the three theories of secession here under consideration. Therefore, before going on to consider the claims of the various separatist groups, it will first be helpful to first detail the arguments put forward by both of these countries for sovereignty over Kashmir.

Pakistan, in support of its claim to legitimate sovereignty over Kashmir, maintains that: (a) by 26/27 October 1947 the Maharaja was no longer competent to sign an Instrument of Accession because he had effectively been overthrown by his subjects; (b) the Instrument of Accession is conditional upon the holding of a plebiscite, as stipulated in the 1948/49 UN Resolutions to which India agreed, which has never taken place; and (c) the State satisfied all the criteria to accede to Pakistan, i.e. it is a Muslim-majority State that is contiguous with it, and therefore should have gone to Pakistan. In support of this latter claim Pakistan cites the fact that both Junagadh and Hyderabad went to India because they were Hindu-majority States – despite the fact that the former had signed an Instrument of Accession with Pakistan.[1] Therefore, by

[1] See Raju G. C. Thomas, 'Reflections on the Kashmir Problem' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.22; and Iftikhar H. Malik, 'The Kashmir Dispute: A Cul-de-Sac in Indo-Pakistan Relations' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder:

the same logic, Jammu and Kashmir should go to Pakistan, i.e. India cannot consistently refuse to accept the validity of Junagadh's accession to Pakistan while also insisting upon the legal validity of Kashmir's accession to it.[2]

The Indian case for retaining the Valley, on the other hand, is based upon historical/legal antecedents and counter-factual reasoning. India claims that the Instrument of Accession gives it legal title to the entire former Dogra Kingdom. India also points out that the 1948/49 UN resolutions for a plebiscite require that Pakistan first withdraw its troops from the parts of the former Dogra kingdom which it still (illegally) occupies before a plebiscite can be held,[3] and questions why Pakistan demands a plebiscite only in Indian-held Kashmir when the UN resolution calls for a plebiscite in the *entire* former Dogra Kingdom.

Nehru's offer of a plebiscite is characterised by India as an extra-legal offer made to the people of Kashmir – *not* Pakistan – that cannot be held to be valid for all time.[4] Moreover, even if India's promise of a plebiscite *is* regarded as an international commitment, India claims that it would still be entitled to not hold a plebiscite on the principle of *rebus sic stantibus* (a vital change in circumstances).[5] Additionally, India also claims that: (a) the requirement to hold a plebiscite was satisfied by elections in the State which were an adequate test of public opinion;[6] (b) that legally "...the assent of the people was not necessary for the validity and the perpetual character of a State's accession"[7]; (c) that had such a plebiscite been held in 1948-49 then, because of the atrocities committed by the Pakistani tribal invaders, India would have convincingly secured the majority of valid votes anyway; and (d) the Kashmir issue should be settled bilaterally between the two countries in accordance with the *Simla Agreement*

Westview Press, 1992), p.305.

[2] *UN Security Counci Official Records*, Third Year, Nos 16-35, pp. 189-209 and Nos 36-51, pp.44-65.

[3] See Thomas, p.21. Also see Damodar R. Sar Desai, 'Origins of Kashmir's International and Legal Status' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), pp.89-90.

[4] Sar Desai, p.82 and pp.88-90.

[5] Sar Desai, p.91.

[6] See Ajit Bhattacharjea, *Kashmir The Wounded Valley* (New Delhi: UBSPD Publishers, 1994), p.124.

[7] Excerpt from a speech by the Indian spokesman, V. K. Krishna Menon, to the UN Security Council quoted in P. B. Gajendragadkar, *Kashmir, Retrospect and Prospect* (Bombay: Bombay University Press, 1967), pp.115-16.

which supercedes all previous Indo-Pakistani agreements on Jammu and Kashmir, including the 1948 UN resolution calling for a plebiscite.

In the previous chapter it was pointed out that, due to its contextualisation in terms of the conflicting founding principles of both India and Pakistan, the Kashmir issue has become an ideological, in addition to a territorial, dispute.[8] Both India and Pakistan have attempted to establish a distinctive national identity that overrides the various conflicting loyalties of their constitutive, regionally concentrated and ethnically diverse sub-communities. The problem, however, is that Kashmir has become a legitimating factor in both countries' respective national identities upon which their national unity is based.[9] To India, Kashmir is a test case for that country's commitment to secularism,[10] whereas for Pakistan, Kashmir's position in India is an anathema to the Two Nation Theory and the notion that Hindus and Muslims constitute two separate nations.[11]

These considerations form the basis for a less-stated argument in favour of India retaining Kashmir based upon the possible consequences of Kashmir's secession – either to Pakistan or as an independent State. It is claimed that while the original causes of Kashmir's unrest may not be religious, because the Kashmir issue has nonetheless become contextualised outside of the State in terms of religious nationalism, if Kashmir really did break away from India then the fate of the remaining 105,000,000 Muslims in India would be in jeopardy.[12] Kashmir's secession would: (a)

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[8] Prem Nath Bazaz, *Kashmir in Crucible* (New Delhi: Pamposh Publications, 1967), p.128.

[9] See Vernon Hewitt, *Reclaiming the Past?* (London: Portland Books, 1995), p.20 and p.126.

[10] See Bhattacharjea, p.4; Ashutosh Varshney, 'Three Comprised Nationalisms: Why Kashmir Has Been a Problem', in *Prespectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), pp.196-97; Omar Khalidi, 'Kashmir and Muslim Politics in India' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.277; and Sumit Ganguly, *The Crisis in Kashmir. Portents of War. Hopes of Peace* (New York: Cambridge University Press, 1997), p.145.

[11] See D. P. Kumar, *Kashmir: Pakistan's Proxy War* (New Delhi: Har Anand Publishers, no date of publication), p.136. Pakistan's population is almost entirely Muslim, but within their ranks exist a number of conflicting sects and ethno-regional divisions that have frequently produced violent clashes. Because religious identity has not always been sufficient to provide Pakistan's different minorities with the necessary political pluralism to co-exist peacefully, Indian apologists claim that Pakistan *needs* Kashmir to divert attention from its own domestic problems and has no interest in seeing a viable, long-term solution to the crisis (e.g. see Hewitt, p.195).

[12] See Varshney, p.198.

provoke a Hindu-Muslim bloodbath across India;[13] (b) empower Hindu nationalists such as the RSS and *Jana Sangh*, by legitimating the claim that Muslims are disloyal to India; and/or (c) reopen the accession of hundreds of princely States which acceded to India, thus threatening India's national unity and the stability of the entire region.[14] Typically Kashmiri separatists tend to respond to these arguments by claiming that if India cannot control Hindu extremists then this is India's problem and that such factors, even if true, are not sufficient to override a right for Kashmir to secede.[15]

B. The Demands of Kashmiri Secessionist Groups

The demands of the various Kashmiri separatist organisations are difficult to specify with a great deal of accuracy simply because there are so many of them, they are frequently highly secretive, and they often rely more on bluster and emotion than statements of fact. It needs to be borne in mind that the people advocating Kashmir's secession are typically appealing to a wider audience. Even if the leaders of these various separatist organisations possess a degree of theoretical sophistication, the people to whom their message is addressed frequently do not. Ordinary Kashmiris – many of whom are uneducated and illiterate – are more likely to be swayed by emotive appeal and religious symbolism than they are by rational dialogue.

As it turns out, many of the considerations appealed to by the various separatist outfits in Kashmir generally *do* mirror the three types of theory considered in this thesis. Typically, however, these groups appeal to a combination of factors that cut across the different theories here under consideration. Moreover, even where two or more groups appeal to the same (sorts of) considerations to justify a right of secession, they may nonetheless have different interpretations of what the final outcome of the exercise of that right should be, i.e. whether Kashmir should secede to Pakistan or to form an independent State.

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[13] This fear was articulated as early as 1955. See Lord Birdwood, *Two Nations and Kashmir* (London: Robert Hale, 1956), p.189.

[14] Author interview with George Verghese (former editor-in-chief of the *Times of India* and Indian diplomat), New Delhi, 29 December 1998. Also see Sar Desai, p.91.

[15] Author interviews with Yasin Malik (JKLF Chairman), Srinagar, 26 November 1998; Prof. Abdul Ghani Bhatt (chairman of the *Muslim Conference*), Srinagar, 25 November 1998; and Mirwaiz Umar Farooq (pro-independence activist and spiritual leader), Srinagar, 28 November 1998.

The pro-independence *Jammu and Kashmir Liberation Front* (JKLF), for example, along with Muslim orientated, pro-Pakistan groups such as the revived *Muslim Conference*, both appeal to a sense of Kashmiri nationalism in order to bolster their respective cases for secession. In addition to noting that most Kashmiris are Muslims in a Hindu-majority State, these groups also appeal to the apparent linguistic and cultural distinctiveness of Kashmiris and their history as a subjugated people. Centuries of misrule and oppression have, it is claimed, forged a unique identity amongst the people of the Valley which, in addition to other cultural and linguistic factors, makes Kashmiris a 'people' or a nation. Indeed, the present Indian occupation of Kashmir and the associated human rights abuses perpetuated against ordinary Kashmiris are seen as just another stage in this defining, almost dialectical, process of foreign subjugation.[16]

Similarly, there are also clear parallels with the JC theory advanced in Chapter Three of this thesis. Reference is often made by Kashmiri separatist groups to the circumstances surrounding the State's incorporation into the Indian Union and the unfulfilled promise of a plebiscite to ratify that incorporation. These claims will be analysed in greater detail shortly, however the general idea is that Kashmir was unjustly incorporated into India in much the same way as, say, the Baltic States were into the former Soviet Union (USSR), and should therefore be permitted to regain its political independence.

Finally, with respect to the LD theory of secession, both factions of the secular, pro-independence JKLF along with other groups often appeal to what they see as a 'natural right to political self-determination.' Again, these demands will shortly be explicated in greater detail, however the general idea is that if a majority of Kashmiris want to secede from India – and, not surprisingly, groups such as the JKLF believe that they *do* – then they should be permitted to do so.[17] Clearly there are resonances here with the liberal principle of voluntary political association and Beran's plebiscitary right of secession.

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[16] Author interviews with Yasin Malik and Prof. Abdul Ghani Bhatt (details above).

[17] Author interview with Yasin Malik (details above).

6.3 THE NATIONALIST CASE FOR KASHMIR'S SECESSION

A. Introduction

It will be remembered from Chapter Two that the Nationalist theory of secession was rejected as unsatisfactory because of difficulties in determining a set of criteria which both distinguished one nation from another and nations in general from other, similar social entities. Additionally, it was also argued that a Nationalist theory of secession is incapable of demonstrating why nations, and *only* nations, should possess a right to independent Statehood. The following discussion deals primarily with the prior question of how Kashmir might sensibly be described as a nation. The additional question of *why* Kashmir possesses a right to secede *qua* its status as a separate nation is largely omitted from discussion. Not only would such a discussion be greater than that which could be sustained within the allotted pages of this chapter, but it is the prior question of how to define a nation that is the primary point of contention, i.e. even if we agree that nations should be granted a right to secede, in what circumstances and why, such agreement is likely to be fruitless unless we can first agree upon which groups qualify as nations.

Furthermore, while Kashmiri separatists have, at least to some degree, speculated upon the basis of Kashmiri nationalism, they often take the right of nations to political independence to be self-evident.[18] Occasional oblique references to United Nations (UN) resolutions notwithstanding,[19] such people generally seem to take it for granted that nations possess a right of secession and that if groups such as the East Timorese, the former Soviet Republics and the Baltic States can permissibly secede, then so can Kashmir.[20] Thus, the real issue – both from a theoretical viewpoint *and* in the context

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[18] i.e. they assume that to demonstrate that Kashmir is a nation is to also show that Kashmir has a right to secede.

[19] e.g. articles 1(2) and 55 of the *United Nations Charter* that list the 'self-determination of peoples' as one of the UN's goals. Kashmiri separatists also often refer to numerous UN resolutions which state that 'peoples' have a right to self-determination and, thus, should be free to determine their political status and pursue their economic, social and cultural development, e.g. see UN General Assembly Resolution 1514 (*Declaration on the Granting of Independence to Colonial Countries and Peoples*, G. A. Res. 1514, 15 U.N. GAOR Supp. No.16 at 66, 67 U.N. Doc.A/4684 1960); the UN *International Covenant on Civil and Political Rights* of 1966 (adopted 16 December 1966, art.1, para.1, 997 U.N.T.S. 171, 173); and the *International Covenant on Economic, Social and Cultural Rights* (adopted Dec.16, 1966, art.1, para.1, 993 U.N.T.S. 3, 5).

[20] Author interviews with Yasin Malik and Prof. Abdul Ghani Bhatt (details above) and JKLF Press Release of 10 August 1998 by Dr Haider Hijazi (JKLF Secretary General). Repeated reference is made

of the demands made by Kashmiri separatists – is how Kashmiris might be said to constitute a nation. The ensuing discussion, while hardly exhaustive, takes some of the main factors appealed to as a suitable basis of (Kashmiri) nationhood and, applying the insights contained in Chapter Two, argues that such accounts must be judged as unsatisfactory.

B. Objective Definitions of Kashmiri Nationhood

First, it must be noted that any nationalist argument – no matter how obtuse – is likely to apply to the Valley alone. The present Indian State of Jammu and Kashmir, like its predecessor the Dogra Kingdom, is an administrative entity created by an imperial process. Not only are there enormous linguistic, religious, historical and cultural differences between the State's three regions of Kashmir, Ladakh and Jammu, but the residents of Ladakh and Jammu have repeatedly expressed considerable hostility towards Kashmiri dominance of political and economic life in the State. Additionally, the residents of these two regions have also expressed a strong preference to remain within India rather than join Pakistan or become a part of an independent State of Kashmir.

Thus, it is difficult to see how any definition of nationhood based upon the subjective and objective criteria discussed in Chapter Two, could sensibly claim that Kashmiris, Ladakhis and Jammuites were members of a common nation. The question, then, must be how the residents of *the Valley* might be described as 'a nation.' One possible response to this question is to appeal to certain objective factors such as a common language, history, ethnicity and culture. Chapter Two of this thesis offered a general theoretical critique of these criteria. The purpose of the following discussion is to examine how that critique is applicable in the case of Kashmir.

In discussion of how Kashmir might be said to constitute a nation by reference to these objective criteria, the first thing to note is that while Kashmiri society may initially appear to be rather homogenous, such appearances are often misleading and

by Kashmiri separatists to Kashmir's 'right of self-determination' but the source or justification of such a right is rarely a topic of speculation amongst such people.

disguise deeper social divisions. Consider, for example, the following breakdown of religious affiliation in the State's three regions.

TABLE 6.1 RELIGIOUS AFFILIATIONS BY REGION IN JAMMU AND KASHMIR AS AT 1981[21]

Region	*Population*	*Percentage of State Population*	*Percentage of Muslims*	*Percentage of Hindus*	*Percentage of Others*
Kashmir	3,134,904	52.36	94.96	4.59	0.05
Jammu	2,718,113	45.39	29.60	66.25	4.15
Ladakh	134,372	2.24	46.04	2.66	51.30
Total	5,987,389		64.19	32.24	3.57

It first needs to be emphasised that any appeal to religious nationalism to justify Kashmir's secession will be limited to Islamist, pro-Pakistan Kashmiri separatist groups such as the *Jamaat-i-Islami*, *Hizb-ul-Mujahideen*, *Harkut-ul-Mujahideen* and *Lashkar-e-Toiba*. These groups frequently see Kashmir's secession as an initial step in the creation of a larger Islamic State in South Asia.[22] "For these far-right chauvinist organizations, the struggle in Jammu and Kashmir is merely an instrument in a broader war against both the Indian state and 'unbelievers' at large. They seek to derive legitimacy for these objectives from Muslim insecurity both within Jammu and Kashmir and elsewhere in India..."[23]

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[21] See Mushtaqur Rahman, *Divided Kashmir* (Boulder: Lynne Rienner, 1996), p.33.

[22] Author interview with a Harkut-ul-Mujahideen area commander, Srinagar, 22 November 1998. Also see Riyaz Punjabi, 'The Concept of an Islamic Caliphate: The Religious and Ethnic Pulls of Kashmir Militant Movement', *Journal of Peace Studies*, Vol.1, No.1, 1993; and Praveen Swami, *The Kargil War* (New Delhi: Left Word, 1999), pp.78-85.

[23] Swami, p.78.

In contrast, other Kashmiri separatist groups such as the JKLF envisage an independent, democratic and *secular* State of Kashmir. The JKLF not only calls for the Pandits to be allowed to return to the Valley, but also stringently rejects the appeal to Islam which characterises these other, Islamist groups.[24] Furthermore, the type of illiberal, fundamentalist State which the *Jamaat-i-Islami* and other, similar groups want to create conflicts with the liberal nationalism here under consideration. Nationalist theorists such as Nielsen,[25] Miller[26] and Tamir[27] argue for a *liberal*, democratic version of nationalism that respects and upholds the individual rights of its citizens and cultural minorities. This is something that will be examined in greater detail shortly. For the moment, however, it will be sufficient to note that these theorists would reject the fundamentalist, illiberal type of State which groups such as the *Jamaat-i-Islami* and their cohorts want to create.[28]

Suppose, then, that we concentrate upon the merits of a Kashmiri national identity based upon Islam, and put to one side the question of whether or not the agenda of those groups who favour an Islamic State of Kashmir is concordant with liberalism. In 1981, almost ninety-five percent of Kashmiris were Sunni Muslims (a figure which would now be higher due to the Pandit exodus of 1990).[29] Yet, it would nonetheless be inappropriate to attempt to construct a definition of Kashmiri nationhood on the basis of this understanding alone. Within each of these religious communities there are strict social divisions according to profession, education and family background. Pandits, for example, are divided primarily into *Gors* and *Karkuns* within which there are other sub-divisions such as *Pandas*, *Buhuris* and *Jyotishis*.[30] Kashmiri Muslims

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[24] See Rahman, p.153.

[25] Kai Nielsen, 'Liberalism, Nationalism and Secession' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998).

[26] David Miller, *On Nationality* (Oxford: Clarendon Press, 1995).

[27] Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993).

[28] e.g. see Nielsen's rejection of exclusionist *ethnic* nationalism (Nielsen, pp.106-108) and his characterisation of liberal democracies "...where human rights are protected and there is a general egalitarian ambience..." (Nielsen, p.110 also see pp.112-13).

[29] Due to a breakdown in law and order 1981 was the last year in which a census was held in Kashmir and, thus, the most recent year for which reliable figures are available.

[30] See Maharaj K. Koul, *A Sociolinguistic Study of Kashmiri* (Delhi: Indian Institute of Language Studies, 1986), pp.22-24; and Henny Sender, *The Kashmiri Pandits: A Study in Cultural Choice in North India* (Delhi: Oxford University Press, 1988), pp.22-24.

are similarly divided into *Pujs* (butchers), *Hanjis* (boat-people) and so forth.[31] Not only is inter-marriage between these different social groups often strictly forbidden, but one's membership of such a group is frequently a more significant determinant of personal identity and social status than the simple variable of religion and, thus, one's identity as a Hindu or a Muslim.[32] Hence, the straightforward statement that ninety five percent of Kashmiris are Sunni Muslims, while formally correct, is in many respects misleading if it is taken to indicate social solidarity across Kashmiri society.

Furthermore, it seems peculiar to attempt to construct a Kashmiri national identity upon religious factors which, by-and-large, are not regarded as important, defining characteristics by many Kashmiris themselves. Aside from the above intra-religious divisions which are frequently more important than one's simple identity as a Muslim or Hindu, Islam has traditionally *not* been a major factor in the mobilisation of Kashmiris. Indeed, Kashmiris have remained largely isolated from broader Islamic influences and the larger currents of Muslim politics in the region.[33] If one were to attempt to define a Kashmiri nation, then presumably it would be preferable to appeal to considerations which *do* have substantial appeal to Kashmiris, and which *are* regarded as being significant by them in terms of their self-identity.

Moreover, Kashmiri Islam also contains numerous practices which are alien to other Muslims and which are regarded as heretical by them.[34] Thus, even if Islam *were* a central, defining feature of Kashmiri self-identity, it would be a brand of Islam which contains numerous features that would be rejected by other Muslims. This makes it difficult to understand how Kashmir's secession to a larger Islamic State might be justified on the grounds of religion, when the citizens of that State would presumably reject cardinal features of Kashmiri religious identity.

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[31] *Hanjis* (who include houseboat owners on Srinagar's Dal and Negin Lakes) in particular appear to be the subject of popular disapprobation by ordinary Kashmiris.

[32] See Koul, pp.22-25; and P. N. K. Bamzai, *A History of Kashmir: Political, Cultural and Social* (Delhi: Metropolitan Book Company, 1962), pp.18ff.

[33] Ganguly, p.40.

[34] Author interview with Balraj Puri (veteran Kashmiri activist and commentator), Jammu, 17 December 1998. Also see G. M. D. Sufi, *Islamic Culture in Kashmir* (New Delhi: Light and Life, 1979); Bazaz, p.14; Riyaz Punjabi, 'Kashmir: The Bruised Identity' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.137; and R. N. Kaul, *Sheik Mohammad Abdullah* (New Delhi: Sterling Publishers, 1985), p.3.

What, then, about a Kashmiri national identity based upon ethnic, cultural or linguistic grounds? Kashmir is racially divided and contains a number of ethnic minorities such as Sikhs, *Gujjars* and *Bakarwals*, all of whom are to varying degrees linguistically, culturally and ethnically distinct from so-called 'ordinary Kashmiris'. Gujjars, for example, while being Sunni Muslims, are semi-nomadic graziers who have their own dress and language (*Gujjari*) thought to be derived from the Punjabi *Pathans*.[35] Similarly, Sikhs who migrated to Kashmir under Afghan and Sikh rule also speak their own language,[36] practice their own religion, follow their own distinctive customs and so forth. Any definition of Kashmiri nationhood based upon ethnic, linguistic, or cultural grounds would presumably exclude these minorities. Yet it is far from obvious *why* these people should not be considered to be Kashmiris and, by extension, excluded from having a say in Kashmir's future.

In consideration of these various, overlapping ethnic, cultural and linguistic schisms within Kashmiri society a brief look at the variable of language is instructive. As the following table indicates, even before the partition of the State and the associated flows of refugees, Kashmir – with the exception of Muzaffarabad which is in present-day Pakistan – was remarkably linguistically homogenous. Yet, while the vast majority of people in modern-day Kashmir continue to speak Kashmiri (ninety seven percent in 1971[37] and ninety eight percent in 1981[38]), this simple fact on its own is misleading.

[35] See Sukhdev Singh Chib, *This Beautiful India: Jammu and Kashmir* (New Delhi: Light and Life, 1977), p.94; Somnath Dhar, *Jammu and Kashmir* (New Delhi: National Book Trust, 1977), p.23 and *Jammu and Kashmir Folklore* (New Delhi: Marwah Publications, 1986), p.23; and Frederic Drew, *The Jummoo and Kashmir Territories* (Delhi: Oriental Publishers, 1971), pp.109-111.

[36] Kashmiri Sikhs tend to primarily speak *Punjabi* and *Dogri* (Koul, p.21).

[37] 1971 census data quoted in Koul, p.8.

[38] The 1981 census gives the total population of the Valley as 3,132,000 (quoted in Hewitt, p.22) and the total number of native Kashmiri speakers within the Valley as 3,076,398 (quoted in Roopkrishen Bhat, *A Descriptive Study of Kashmiri* (Delhi: Amar Prakashan, 1987), p.2).

TABLE 6.2. DISTRIBUTION OF LINGUISTIC GROUPS IN THE FORMER DOGRA KINGDOM AS AT 1941[39]

District	*Percentage of Kashmiri Speakers*	*Percentage of Dogri Speakers*	*Percentage of Punjabi Speakers*	*Percentage of Hindustani Speakers*
1. Jammu Province				
Jammu	0.68	72.13	20.14	7.05
Kathua	1.40	92.56	1.98	4.06
Udhampur	47.30	51.12	0.59	0.99
Riasi	18.55	60.74	10.84	9.87
Mirpur	0.04	11.82	80.61	7.53
Chenani Jagir	7.56	84.07	0.80	7.57
Poonch Jagir	13.59	0.58	15.86	69.97
2. Kashmir				
Baramula	97.13	0.03	2.13	0.71
Anantnag	98.20	0.24	1.17	0.39
Muzaffarabad	31.71	0.07	63.53	4.69
3. Frontier Districts				
Ladakh	71.43	13.09	14.28	1.20
Astor	35.29	3.17	60.18	1.36
Gilgit Lease	33.04	–	45.65	21.31
Gilgit Agency	3.12	–	17.19	79.69

One of the reasons why language was rejected as a criterion of nationhood in Chapter Two was the difficulty in distinguishing between different dialects of the same language.[40] Similar considerations are also relevant in the context of Kashmir. Aside from the numerous linguistic minorities who live in Kashmir, there is also substantial

[39] Adapted from 1941 census data quoted in Rahman, p.34.

[40] See Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), p.49.

variation *within* the Kashmiri language. For example, there are some differences between the Kashmiri spoken by Muslims and that spoken by Pandits.[41] Furthermore, the Kashmiri spoken in the Valley is divided into three dialects: (a) *Maraz*, spoken in the south and south-eastern regions of Kashmir; (b) *Kamraz*, spoken in northern and north-western Kashmir; and (c) *Yamraz*, the dialect of Srinagar and surrounding areas. Other mixed dialects of Kashmiri (e.g. *Kashtawari/Kishtawari* and *Poguli*) are spoken *outside* of the Valley in Doda and Pogul respectively, as are *Siraji* and *Rambani*.[42]

Therefore if the variable of language were made the measure of Kashmiri nationhood, then in order to accommodate the various dialects of Kashmiri spoken *within* the Valley, such a definition would presumably also have to include these other Kashmiri-speaking groups *outside* of Kashmir. However, while Kashtawari/Kishtawari, Poguli, Siraji and Rambani are dialects of Kashmiri, the people who speak these languages generally have no real connection or sense of solidarity with the residents of the Valley. More importantly, a linguistic definition of Kashmiri nationhood would also *exclude* minority groups such as Sikhs, Gujjars and Bakarwals within Kashmir, many of whom have not only resided in the Valley for centuries, but who are regarded by themselves (and others in Kashmir) as being Kashmiri. Such a situation would be analogous to giving Australians citizenship rights in New Zealand while denying those same rights to the indigenous Maori population and first generation immigrants to New Zealand from non-English speaking countries. Not surprisingly, such a state of affairs would be rejected by most people for its most unsavoury and deleterious moral and practical implications.

C. Subjective Definitions of Kashmiri Nationhood

What, then, about subjective criteria, i.e. a collective Kashmiri consciousness based upon an awareness of a distinct Kashmiri identity and the sense of solidarity that this consciousness creates? Here one might appeal to the secular, politico-cultural identity

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[41] See Koul, pp.74ff; and Bhat, pp.2-3.

[42] See Omkar N. Koul and Kashi Wali, *Kashmiri* (London: Routledge, 1997), p.xiii; Omkar N. Koul and Ruth Laila Schmidt, *Kashmiri: A Sociolinguistic Survey* (Patiala: Indian Institute of Language Studies, 1983); Koul, pp.1-9; and Somnath Dhar, *Jammu and Kashmir Folklore* (New Delhi: Marwah Publications, 1986), pp.28-30. Rahman and Bhat also states that some people in Poonch, Uri and Riasi – all areas outside the Valley – also speak Kashmiri (see Rahman, p.34; and Bhat, pp.2-3).

in the Valley known as Kashmiriyat that is allegedly comprised of Muslim, Hindu and uniquely Kashmiri understandings and cultural elements. However, Kashmiriyat is an elusive and controversial notion. Some scholars place a great deal of importance upon Kashmiriyat as a sociological phenomenon and claim that it is fundamental to a proper understanding of Kashmiri society, politics and history.[43] Others, on the other hand, reject it as an "ill-defined" and "ineffable" product of the romantic, idealised misconceptions to which writers on Kashmir are frequently prone.[44]

For present purposes the issue of Kashmiriyat may be put to one side and other, alternative conceptions of Kashmiri national identity given prominence. To construct a Kashmiri national identity based upon the notion of Kashmiriyat is to presuppose the existence of such an identity. However, we cannot simply *assume* that there exists a common national identity amongst Kashmiris (that makes them a nation), when the very question we are supposed to be addressing in the first place is precisely whether or not such an identity exists. Moreover, as the scholarly debate surrounding Kashmiriyat clearly demonstrates, the nature and, indeed, very existence of such a notion, is something that clearly cannot be taken for granted.

Hence, because an in-depth study of the case for Kashmiriyat is beyond the scope of the present analysis, it makes sense to look at alternative, subjective definitions of Kashmiri nationhood. Before doing so, however, it is worth noting that the disagreement over the existence and nature of Kashmiriyat does point to a general problem with subjective definitions of nationhood: i.e. to the extent that such definitions must frequently rely on factors which are difficult to quantify and/or empirically corroborate, they are likely to be the subject of considerable controversy and charges of idealism and fakery.

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[43] e.g. Punjabi (1992); T. N. Madan, 'Meaning of Kashmiriyat: Cultural Means and Political Ends' in *Kashmir: Need for Sub-Continental Political Initiative*, ed. G. M. Wani (New Delhi: Ashish Publishing House, 1995); and Dr Amitab Mattoo (Professor of International Relations at *Jawaharlal Nehru University*), author interview, New Delhi, 9 November 1998.

[44] Ganguly, pp.17-18. Also see Swami, p.107; and Mohammad Ishaq Khan, *Kashmir's Transition to Islam: The Role of Muslim Rishis* (New Delhi: Manohar, 1994). This opinion was expressed to me in person by Dr Khan (Srinagar, 12 December 1998) and numerous other journalists and writers in India.

One factor frequently appealed to by a variety of Kashmiri separatists as a constituent component of Kashmiri national identity is Kashmir's history as a subjugated territory. The claim, briefly introduced above, is that this historical process of occupation and misrule has created a collective consciousness amongst Kashmiris as a distinct people, or nation. The problem with such an account, however, is that Kashmiris are hardly the only people (in the region) to have suffered harsh and oppressive rulers of foreign origin. Indeed, the Indian sub-continent has seen an enormous number of foreign intruders come and go over the centuries, from the Aryan invasions of 1500-1000 BC.[45] to the Mongols and the Moghuls just to name a few. If foreign subjugation and misrule are the measure of nationhood, then Kashmiris cannot constitute a separate nation, but must instead be part of a larger nation that incorporates other, similar, historical victims.

Perhaps, then, the claim is not that foreign conquest by the Moghuls, Afghans and Sikhs has created a common Kashmiri identity – although these may well be contributing factors. Rather, it is the *present* Indian occupation and atrocities committed by Indian troops which have produced an awareness amongst Kashmiris that they constitute a separate people. Once again, however, Kashmir is *not* the only region in India to rebel against Indian authority or to have that rebellion repressed, often brutally, by the Indian government. The same was true of Punjab in the 1980s and is today also true of, for example, Assam and Nagaland in India's north-east. Thus, if Indian occupation and repression are the yardstick of nationhood, then Kashmiris must be members of the same nation as, say, the Punjabi Sikhs, Assamese and Nagas.

It might, at this point, be objected that Indian occupation and oppression are not the source of Kashmiri national identity but, rather, that this identity already existed and Indian misrule merely *aroused* it. If, however, Indian misrule is not the basis of Kashmiri national identity – but simply a catalyst for its formation – then what *is*? Furthermore, the argument is back-to-front. The nationalist argument says that in order to possess a right to secede a group must first constitute a nation. Where a nation demands the right to secede and this demand is refused by its parent State then, *ceteris*

[45] See Hewitt, p.26

paribus, that nation has the right to revolt against its parent State in order to claim its rightful political inheritance. In contrast, what is being claimed here is that Kashmiris became a nation only *after* they revolted against Indian authority and had their rebellion brutally suppressed. If, however, Kashmiris did not constitute a nation at the time of their rebellion against Indian authority then, according to the Nationalist argument, they can't have possessed a right to secede and, thus, their rebellion must be judged to have been unjust. We cannot consistently claim that a group possesses a moral right because, at some time in the (recent) past, the same group performed an act which they did not have a right to perform and which at the time was morally wrong.

Indeed, making Indian repression the basis of Kashmiri national identity might, quite paradoxically, provide an argument *in favour* of continued Indian occupation and misrule. Under the nationalist account in order to possess a right to secede, Kashmiris must first be a nation. What happens, however, when the source, or catalyst, of that national identity is injustice in the form of foreign misrule and oppression? If the injustice is removed then while the national identity may not disappear altogether, it may nonetheless suffer a degree of quantitative and/or qualitative harm. Where people are victims of a common oppressor then a mutual interest in cooperating to survive and end that oppression may induce a sense of empathy and shared identity and understanding. Once the oppression disappears, however, then so too may the (national) solidarity it inspired, only to be replaced by old differences and enmities. Ironically, then, from a nationalist perspective it might be better if India remained in Kashmir and continued to brutalise its people.

Furthermore, if Kashmiri nationhood is defined in terms of Indian oppression and misrule then this also creates a conflict with the defence of nationality given by the *liberal*-nationalist theorists under consideration in this thesis. Miller, for example, defends nationality by arguing that it upholds liberal values by serving as the main focus of collective loyalty in large societies in which the clan and village can no longer fulfil this function.[46] An example of this form of argument is Miller's claim that there is a positive relationship between national homogeneity on the one hand, and democratic government and the effective operation of schemes of redistributive and

[46] See, for example, Miller, p.153 and pp.184-85.

social justice on the other. Similarly, Kymlicka also attempts to construct a link between liberalism and national identity by claiming that a flourishing national culture is a necessary prerequisite to the effective exercise of individual freedom of choice, while the same sorts of claims are also attributable to Tamir's so-called 'liberal nationalism.'

This creates a problem, however, when the basis of the national identity in question is a decidedly illiberal state of affairs characterised by misrule and oppression. Here one is inclined to recall Kukathas's observation that the entrenchment of Kymlicka's minority rights would destroy many of the (illiberal) cultural communities which Kymlicka wants to preserve.[47] Similarly, we cannot defend Kashmiri national identity on the basis that it furthers democratic governance and individual liberty, when this same national identity was both created by, and is dependent upon, a denial of the very democratic rights and individual freedoms which it is supposed to preserve. Indeed, if Indian oppression really *is* the source of Kashmiri national identity, then it seems that a defence of Kashmir's right to secede premised upon the imperative of preserving Kashmiri national identity must necessarily entail a rejection of liberalism.

6.4 THE JUST CAUSE CASE FOR KASHMIR'S SECESSION

A. Introduction

A JC theory is one which grants a right of secession only to those groups which have been the victim of an injustice, and different JC theories may take different injustices as sufficient grounds for secession. Buchanan claims that JC theories are distinct from other, alternative types of theory because they require a group to first be the victim of certain specified injustices before that group can possess a right to secede. Conversely, LD or nationalist theories, claims Buchanan, do not require a group to be the victim of an injustice and, thus, are committed to the view that groups may secede from States which are 'perfectly just.' For this reason Buchanan believes that LD and Nationalist theories of secession are inferior to JC theories.[48]

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[47] Chandran Kukathas, 'Are There Any Cultural Rights?' in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), p.244.

[48] See Allen Buchanan, 'Theories of Secession', *Philosophy and Public Affairs*, Vol.26, No.1, 1997,

Chapter Three of this thesis questioned these claims by pointing out that, as far as a normative theory of secession is concerned, the important issue is when a State commits the injustice of not allowing a group to secede. Moreover, to say that a group possesses a moral right to secede is also to say that that group's continued political union with its parent State is morally unjust, as are any attempts by the parent State (or other parties) to maintain that union. Hence, as long as the group remains a constituent component of its parent State a condition of injustice obtains (i.e. the State of which the group is a part is an unjust State), and the only way in which this condition of injustice can be remedied is by the group's secession.

Therefore, Buchanan's claim that non-JC theories of secession grant a right of secession from States which are 'perfectly just' simply begs the question of what constitutes an injustice and when a State is un/just. Moreover, for all three types of theory *any* State that refuses to recognise a group's legitimate right to secede is *by definition* unjust. Thus, it seems that the only difference between a JC theory such as Buchanan's and, say, a LD theory such as Wellman's,[49] are the *types* of injustice(s) which each theory regards as sufficient to justify a right of secession. Whereas Buchanan requires a group to be a victim of discriminatory re-distribution, unjust incorporation or a lethal threat in order to possess a right to secede, Wellman, and other LD theorists like him, take the simple injustice of holding a group captive against the will of (a majority of) the group's members as sufficient to ground a right to secede.

Buchanan identifies three types of injustice which he believes are sufficient to ground a right to secede: discriminatory redistribution; the need for self-preservation; and rectificatory justice. Beginning with the former argument, it is difficult to see how one might coherently attempt to justify Kashmir's secession by reference to a claim of discriminatory redistribution. Rather than contributing a disproportionately high amount of revenue to the Indian federation, Kashmir instead receives substantial injections of capital *from* the Indian government to cover the State's often substantial

pp.40ff.

[49] Christopher H. Wellman, 'A Defence of Secession and Political Self-Determination', *Philosophy and Public Affairs*, Vol.24, No.2, 1995.

budget deficits.[50] Indeed, financially speaking, Kashmir is to India what Tasmania is to Australia, or the Falkland Islands are to Britain.

Similarly, while one might attempt to make a case for Kashmir's secession by reference to the Argument from the Need for Self-Preservation (ANSP), such a claim would be problematic. Kashmiris have undoubtedly suffered a great deal over the last decade, however the atrocities committed by Indian troops could not really be said to constitute a *lethal threat* of the sort imagined by Buchanan as sufficient to justify a right of secession.[51] Moreover, these atrocities were committed only *after* Kashmiris demanded a right to secede and violently attempted to exercise this right. Consequently, any argument for Kashmir's secession based upon atrocities committed by the occupying Indian forces is back-to-front in the same way that a definition of Kashmiri national identity based upon these injustices is. It seems bizarre – not to mention philosophically incoherent – to grant a right of secession to a group because they suffered certain injustices as a result of trying to exercise a right (to secede) that they never in fact possessed.

Amongst the three types of injustice identified by Buchanan as sufficient to ground a right to secede, it is the ARJ which is most pertinent to Kashmir. The ARJ states that "...a [geographical] region has the right to secede if it was *unjustly incorporated* into the larger unit from which its members wish to separate."[52] 'Unjust incorporation' is defined as the *forceful annexation* of the seceding region by either the existing State or by some earlier State that is the predecessor of the currently existing State.[53] Two factors are pertinent in the claim that Kashmir was unjustly incorporated into India: (a)

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[50] e.g. for the 1997-98 financial year the State's income and expenditure were projected to be Rs5662 Crore and Rs6155 Crore respectively – a shortfall of Rs533 Crore (source: *Jammu and Kashmir 50 Years* (Information Department, Jammu and Kashmir State Government, 1998), p.288). This deficit was forecast to decrease to Rs142.08 Crore for the 1999-2000 financial year (see *The Kashmir Times*, 5 March 1999). Indeed, in many respects the State is caught in something of a poverty trap as a large part of its expenditure (Rs 209 Crore in 1997-98) is devoted to interest payments on loans from the central government (see *Jammu and Kashmir 50 Years*, p.285).

[51] Buchanan cites the plight of Jews in Nazi occupied Poland as an example of the type of lethal threat that might justify a group's secession on the grounds of self-preservation (Buchanan (1991), pp.66-67). While the serious human rights abuses perpetrated by Indian forces in Kashmir should neither be ignored nor belittled, they are simply not comparable to the genocide perpetrated by the Nazis in Poland.

[52] Buchanan, p.67 [emphasis added].

[53] Also see Lea Brilmayer, 'Secession and Self Determination: A Territorial Re-Interpretation', *Yale Journal of International Law*, Vol.16, No.1, January 1991, p.190.

the circumstances surrounding the State's accession to India; and (b) the unfulfilled Indian promise of a plebiscite. The respective arguments based upon each of these two factors may be briefly summarised as follows.

1. *The Circumstances of Accession Argument*: As was noted in Chapter Five, the circumstances surrounding Kashmir's accession to India are the subject of considerable controversy amongst historians. Some scholars – most notably Lamb – have claimed that Indian military intervention in the State occurred *prior* to the Maharaja signing the Instrument of Accession. There is also some speculation over whether or not the Maharaja signed an Instrument of Accession at all or, if in fact he did, whether or not he did so under duress.[54] The Circumstances of Accession Argument claims that if India seized Kashmir prior to the State formally acceding to the Indian federation, then India was effectively invading an independent country in much the same way as Indonesia annexed East Timor, China seized Tibet or the USSR invaded the Baltic States. Thus, because India's occupation of Kashmir is a result of aggressive military action it not only lacks *de jure* authority over Kashmir but, according to the ARJ, also *moral* authority over Kashmir.

2. *The Broken Promise Argument*: Whereas the above argument relies upon a claim of wrongful taking, or illegitimate acquisition, the Broken Promise Argument relies more upon contractual considerations and concerns India's refusal to honour its pledge to hold a plebiscite in Kashmir. The claim is that the people of Kashmir acceded to India on the understanding that they would have the subsequent opportunity to ratify that accession in a plebiscite and, if a majority of them so chose, opting instead for Pakistan. Because India has not only never held such a

[54] See Alastair Lamb, *Kashmir A Disputed Legacy* (Karachi: Oxford University Press, 1992), pp.135-40; and Victoria Schofield, *Kashmir in the Crossfire* (London: Tauris, 1996), pp.148-50. Hewitt, on the other hand, ridicules Lamb's reservations over the timing and legitimacy of the accession (Hewitt, p.78). There is also the associated claim that India had always planned to seize the State militarily and had been preparing to do so weeks before the event. See, for example, General Sir Frank Messervy, 'Kashmir', *Asiatic Review*, Vol.45, January 1949, p.469; and Pervaiz Iqbal Cheema, 'Pakistan, India and Kashmir: A Historical Review' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.96. Similarly, Choudhury claims that Kashmir's accession "...was achieved by deliberately creating a set of circumstances with the object of finding an excuse to stage the accession." See G. W. Choudhury, *Pakistan's Relations with India 1947-66* (London: Pall Mall Press, 1969), pp.104-105. Others, such as Birdwood, claim that these allegations are false (Birdwood, p.59).

plebiscite, but now refuses to do so, it is claimed that India has broken the terms of the agreement it entered into with Kashmiris over the future of their State and, therefore, cannot be said to possess legitimate territorial sovereignty over it. Just as under common law a party's (legal) property right is voided when that party fails to adhere to the terms and conditions which govern the property right, so India's right of sovereignty over Kashmir is also invalidated by it reneging on its commitment to hold a plebiscite.

B. The Primacy of Theoretical Versus Real-World Considerations

At this point it should be noted that what is at issue here is an argument's philosophical coherency, not the extent to which it is articulated by political elites and laymen. One might, for example, claim that the circumstances surrounding the State's accession, while clearly a *relevant* issue to many who advocate Kashmir's secession, cannot adequately explain *why* there are secessionist tendencies in Kashmir and therefore is not germane to the determination of whether or not Kashmiris possess a right to secede. On the one hand, the belief that India seized Kashmir through a combination of duplicity and force may lend a sense of historical and legal authenticity to the claim that India does not possess legitimate sovereignty over Kashmir. Furthermore, to the extent that Kashmiris experience these historical injustices as part of their own heritage, they might then become motivated to support Kashmir's secession from India as a matter of rectificatory justice.[55]

On the other hand, however, such factors cannot be *exclusively* responsible for the insurgency in Kashmir. Suppose, for example, that some fresh, relatively incontestable, historical evidence came to light which established beyond any reasonable doubt that the Maharaja really *did* voluntarily sign the Instrument of Accession *before* Indian troops entered the State. Would this then validate the Indian claim to Kashmir in the eyes of Kashmiri separatists? Presumably not. Counter-factually, we may suppose that even if such evidence *did* emerge then Kashmiri separatists would nevertheless not abandon their demands for an independent Kashmir, or a Kashmir in Pakistan. Militants in Kashmir, once they learned of such a discovery,

[55] See Brilmayer, pp.191-92.

would be unlikely to lie down their guns secure in the knowledge that the Maharaja and India did their paperwork correctly.

Similarly, a widespread belief that the legal principles and conventions pertaining to the State's accession were not adhered to cannot, on its own, explain the popular support in Kashmir for political independence from India. Militants fighting in Kashmir – not to mention most ordinary Kashmiris who also oppose Indian rule – are not aggrieved by a lack of due process in 1947, nor are they seeking posthumous redress for an authoritarian monarch. Indeed, it seems bizarre to argue that Kashmir's final political status should be decided by attempting to read the mind of a long-deceased tyrant like Hari Singh.

A similar objection may also be levelled against the claim that Kashmir possesses a right to secede because of India's unfulfilled promise of a plebiscite. The promise of a plebiscite, while clearly a *relevant* issue to many who advocate Kashmir's secession, cannot on its own adequately explain *why* there are secessionist tendencies in Kashmir. On the one hand, the unfulfilled Indian promise of a plebiscite clearly adds a sense of moral (and, perhaps, legal) veracity to the claim that Kashmir has a right to secede and that India's position in Kashmir is duplicitous and contrary to the wishes of most Kashmiris. Why, ask many Kashmiris, does India refuse to hold a plebiscite other than for the simple reason that India knows that, because most Kashmiris oppose Indian rule, it would lose such a vote?

On the other hand, however, suppose that some relatively indisputable historical evidence came to light that showed that, despite all appearances to the contrary, no promise of a plebiscite had ever been made by Nehru, Mountbatten, the Indian government or anyone else. Rather, the whole question of a plebiscite had been an elaborate ruse constructed by some misguided or malevolent group of individuals. Would those who support a plebiscitary right of secession for Kashmir then be appeased by India's fidelity and abandon their demand for a plebiscite to determine the State's future? Almost certainly not. Those who demand a right for Kashmir to secede do not do so simply because they want to punish India for breaching a past promise, nor would they abandon this demand were it to transpire that no such promise had ever

been made. If, however, Kashmir possesses a right to secede *despite the fact* that India never promised Kashmiris a plebiscite in which they could unilaterally determine their political future, then it must be something *other* than India's failure to abide by its promise of a plebiscite that justifies Kashmir's right to secede.

In response to these objections it must be emphasised that the important thing is an argument's theoretical coherency; not the degree to which it is enunciated by political actors and laymen. A normative theory of secession is not undermined by virtue of the fact that secessionist tendencies in the real-world are typically motivated by considerations other than those which underpin the general theory. Act-consequentialism, for example, is an ethical theory of moral rightness/wrongness that is neither properly understood nor explicitly endorsed by many people other than moral philosophers. Ordinary people may, on occasion, employ act-consequentialist reasoning in an attempt to justify a certain course of action or state of affairs. However, typically they do so in a manner that is not entirely consistent with act-consequentialism and without fully understanding all of the theoretical and practical implications of act-consequentialist reasoning. Yet, philosophically speaking, we would not be inclined to exclude act-consequentialism from consideration as a satisfactory theory of normative ethics simply because it did not enjoy wide public appeal or understanding.

Similar considerations also apply in the case of Kashmir. In the present context the issue is not the degree to which a particular moral argument for Kashmir's secession enjoys acceptance amongst Kashmiri political elites and laymen. Rather, the issue is whether or not the argument provides a coherent case for Kashmir's political independence from India. Regardless of whether or not it mirrors demands made in the real-world, one could, nonetheless, still construct and defend from objection a denial of legitimate Indian title to Kashmir based upon that country's 1947 violation of the provisions governing the accession of the princely States. This might not be how Kashmiri separatists refute Indian claims of sovereignty to Kashmir, but it would, nevertheless, be *a* refutation of Indian claims to sovereignty over Kashmir which, were it properly pursued, may ultimately provide a valid moral justification for Kashmir's secession.

C. The First Variant of the Circumstances of Accession Argument

There are two, inter-related questions we need to ask about the claim that India lacks legitimate territorial sovereignty over Kashmir because of its alleged actions in 1947 and the circumstances surrounding the State's accession to India. First, exactly *why* does India lack territorial sovereignty over Kashmir because of what occurred at the time of Kashmir's accession, i.e. in what sense does India's 1947 military intervention negate its claim to present-day sovereignty over Kashmir? Second, if India does not possess legitimate sovereignty over Kashmir then who does? Demonstrating that India lacks legitimate title to Kashmir does not also demonstrate that, say, Pakistan *does* possess such title.

In relation to the former question one may, for example, begin with the simple claim that (*pace* Lamb) India intervened militarily in Kashmir prior to Maharaja Hari Singh signing the Instrument of Accession. Thus, while the Maharaja *did* sign the Instrument of Accession, and did not do so under duress, he nonetheless signed it *after* India began landing troops in the State with the result that India illegitimately seized the State by force.[56] Alternatively, it may be claimed that the Maharaja *never* agreed to accede to India, or only did so under duress as a result of the Indian military occupation effectively making the State's accession to that country a *fait accompli*. Consequently, the issue is no longer simply one to do with the *timing* of accession, but whether or not formal accession ever took place and, if it did, whether or not it was done voluntarily.[57]

If, in fact, this *is* what actually happened, then one might make a case for Kashmir's secession along the same lines as, say, the secession of the Baltic States from the former USSR or East Timor from Indonesia. Note, however, that these arguments rely on a controversial account of historical events that may, or may not, be correct. Indeed, it is possible – even quite likely – that the *real* events pertaining to the State's accession may never be known for certain.[58]

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[56] Lamb, pp.135-40.

[57] See, for example, Alastair Lamb, *The Indian Claim to Jammu and Kashmir: A Reappraisal* (London: World Kashmir Freedom Movement, 1993).

[58] Clearly various parties to the Kashmir dispute have an interest in promulgating their own particular version of the events surrounding accession and in some cases concealing the true events of the time. This

Another possible response is to claim that India lacks legitimate sovereignty over Kashmir because, by manipulating events and using military force, it failed to adhere to the agreed rules and procedures governing accession. Because, however, the provisions governing accession only allowed a State's ruler the simple choice of joining India or Pakistan, failure to follow these provisions cannot, on its own, justify the creation of an *independent* State of Kashmir. Rather, if Kashmiris possess a right to independent Statehood, then it must be for some reason other than the fact that Indian military intervention prevented the provisions governing the partition of Kashmir following the lapse of British paramountcy in 1947 being adhered to.

The argument, then, must be that had India *not* interfered in Kashmir's accession, and the Maharaja been permitted to make a voluntary decision on the State's future, then he would have opted to join Pakistan. At the very least, however, such a claim is controversial and difficult to empirically corroborate. Counterfactually, it is difficult to determine with any real degree of accuracy whether the Maharaja would have preferred Pakistan to India. Moreover, given the available historical sources[59] – not to mention the fact that the Maharaja was a Hindu – there is at least *some* reason to doubt such an assertion.

More importantly, to base Kashmir's right to secede upon a failure by India to adhere to the original agreement governing the partition of the princely States is to assume that that agreement was itself just. Yet it is far from obvious why, particularly from a liberal perspective, such an assumption should be made. For example, just because the original partition agreement contained no opportunity for independent Statehood, it

became evident during fieldwork in India in 1998/99 at which time I was fortunate enough to be granted an interview with a former officer in the Maharaja's army, Capt (Retd.) Diwan Singh (Jammu, 14 November, 1998). During the interview Captain Singh insisted that the Maharaja always intended to accede to India, but gave the impression of favouring independence to enable the withdrawal of troops from the North Western Frontier Province and the transfer of certain privately owned lands in Gurdaspur. Others, however, cast aspersions upon these claims and Capt Singh himself later retracted his statement claiming that because there were officials in a neighbouring room monitoring the interview he was unable to recount an accurate version of events. He nonetheless suggested that I travel to Pathankot to search for the official records pertaining to the transfer of the lands in Gurdaspur. Reluctantly I was forced to the conclusion that the whole story was a ruse, and that the duplicity of certain vested interests made uncovering the real version of events surrounding Kashmir's accession a seemingly impossible task.

[59] On the Maharaja's hostility towards Pakistan and his proclivity towards independent Statehood see *Constitutional Relations Between Britain and India. The Transfer of Power*, Vol. IX, No.37; Birdwood, p.40; D. K. Joshi, *A New Deal in Kashmir* (New Delhi: Ankur Publishing House, 1978), pp.8-9 and 28-

does not follow from this that Kashmir did not in 1947 – and does not today – possess a right to full political independence from India. Rather, it simply means that such a right cannot be grounded in the provisions governing the accession of the princely States, or a failure by India to adhere to them. Thus, we need to look beyond the narrow legalities of the issue instead of simply taking as given the moral rectitude of an agreement concluded between a colonial power and an autocratic monarch that included no provision for popular consultation.

Moreover, if Kashmir's right to secede is grounded exclusively in India's failure to abide by the provisions governing the accession of princely India, then this must mean that had India in fact adhered to these provisions then there would be no question of Kashmir today possessing a right to secede. Conversely, if Kashmir possesses a right to secede *despite the fact* that India faithfully adhered to these provisions, then it must be something *other* than a failure to follow these provisions which justifies Kashmir's secession. Hence, to claim that India lacks legitimate sovereignty over Kashmir because it failed to abide by the rules and procedures governing Kashmir's accession, is to endorse those rules and procedures – and, *a fortiori*, the Maharaja's authority to unilaterally decide Kashmir's future – as legitimate.[60]

Similar considerations also apply to the claim that Kashmir possesses a right to secede because the Maharaja never acceded to India, or did so under duress as a result of prior military intervention by India. If it is the simple lack of voluntary accession which is the source of a contemporary right for Kashmiris to secede, then this must mean that the sovereignty of the Maharaja and his authority to unilaterally determine Kashmir's political future were legitimate. If, on the other hand, the Maharaja was *not* the legitimate sovereign of Kashmir – and thus had no authority to determine the State's political future – then it must be something other than lack of formal accession by Hari Singh which justifies Kashmir's right to secede. One cannot ground a right

29; and Riyaz Punjabi, 'Kashmir Imbroglio: The Socio-Political Roots', *Contemporary South Asia*, Vol.4, No.1, 1995, pp.41-42.

[60] Note, however, that Pakistan explicitly denies this assertion by claiming that the Maharaja had effectively been overthrown by his subjects and forced to leave his capital. See Cheema, p.96; S. M. Burke, *Pakistan's Foreign Policy: An Historical Analysis* (Karachi: Oxford University Press, 1973), pp.27-28; and *UN Security Council Official Records*, Fourth Year, Special Supplement No.7, UNCIP Third Report, S/1430, 9 December 1949.

upon the failure of an agent to perform an action that s/he had no authority to perform in the first place.

It is, however, an unusual political philosophy, indeed, that would endorse the authority of an autocratic despot such as Hari Singh to decide the political fate of more than four million individuals, the majority whom he had actively discriminated against and conspired to keep in a condition of abject poverty. Whatever the philosophical worth of such a theory, or the form that it might take, it is clear that it cannot be a *liberal* theory. Indeed, to premise a right for Kashmir to secede upon a lack of adherence to the formal provisions governing the partition of princely India is, from a liberal perspective, to throw the baby out with the bath-water. Thus, while the injustice of the rules and procedures governing the accession of the princely States not being adhered to *may* justify a right for Kashmir to secede to Pakistan – although not a right of independent Statehood – it does so at the price of abandoning liberalism and so would be rejected by the theorists here under consideration including the leading JC theorist, Allen Buchanan.

D. The Second Variant of the Circumstances of Accession Argument

A second possible response to the question of why India lacks sovereignty over Kashmir because of its actions in 1947, is that by militarily intervening in Kashmir and seizing the State by force, India denied Kashmiris the right to determine their political destiny. The morally significant thing here is the use of force *simpliciter*, not that the use of force prevented certain rules and procedures being followed. There are two things that should be noted about this claim. First, the assertion that India lacks legitimate sovereignty over Kashmir because it acquired the State by force in 1947, even if correct, simply raises the question of who now *does* possess sovereignty over Kashmir. Thus, the Pakistani claim that the Maharaja cannot have transferred legitimate sovereignty to India because he had effectively been overthrown by his subjects demonstrates, at best, that India does not possess legitimate title to Kashmir. It does not also show that *Pakistan* now possesses that sovereignty.

Second, there remains the additional question of *why* India's past use of force negates its contemporary claim to legitimate territorial sovereignty over Kashmir. Why is it

that acquisition by force is insufficient to ground a claim of legitimate territorial sovereignty? Buchanan claims that the ARJ's appeal stems from the *assumption* that in cases of forceful acquisition such as the USSR's acquisition of the Baltic States "...secession is simply the reappropriation, by the legitimate owner, of stolen property. The right to secede, under these circumstances, is just the right to reclaim what is one's own"[61]

On its own, however, Buchanan's assertion simply begs the question it is supposed to answer. If a right to secede is explicated in terms of whether or not a *territory* – as opposed to a *group* – has a moral right to secede, then what matters is who the legitimate owner(s) of that territory is/are, i.e. the State or a secessionist sub-group within the State. We cannot simply *assume* that the secessionists are the legitimate owners of the seceding territory, when it is precisely this question of territorial ownership that the theory is supposed to address in the first place.[62] For this reason the ARJ must be coupled with an account of legitimate territorial ownership, or sovereignty, that tells us in what circumstances a State has legitimate title to its territory and in what circumstances that title is transferred to, or resides with, a secessionist sub-group.

Buchanan recognises this difficulty by appealing to an agent/trustee account of territorial sovereignty,[63] which states that a secessionist group possesses legitimate title to the territory it covets when the terms of the State's trusteeship are either breeched or were never fulfilled.[64] According to this agent/trustee account a State breeches its trusteeship – and thus *loses* its territorial sovereignty – when it engages in practices of discriminatory redistribution or oppression of the sort that constitutes a so-called lethal

[61] Buchanan (1991), p.67.

[62] This point is also recognised by Kymlicka who questions why should we start from the assumption that the State already possesses legitimate title to its territory and, hence, that the burden of justification therefore falls upon the secessionists rather than the State of which they are a constituent component. Will Kymlicka, 'Buchanan, Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec', *Political Theory*, Vol.20, No.3, 1992, p.532.

[63] See Chapter Three of this thesis.

[64] See Buchanan (1991), pp.108-114.

threat against the inhabitants of a sub-region.[65] In contrast, where a State wrongly acquired a territory through so-called 'unjust taking' then that State was *never* the trustee of the particular territory and, thus, the question of the State's possession of legitimate sovereignty over the territory simply does not arise.[66]

As was noted above, it is the latter argument of wrongful acquisition through unjust taking/incorporation which is pertinent in the case of Kashmir. Moreover, a territory is unjustly taken/incorporated when it is forcibly annexed by a larger, more powerful State such as, say, the Baltic States were by the USSR. For Buchanan, the strength of the ARJ lies in its ability to demonstrate, not only that the State *lacks* legitimate title to the seceding region, but also that the secessionists *possess* such title: "By appealing to history, it [i.e. the ARJ] shows that the state lacks territorial sovereignty over the seceding area because it unjustly appropriated the area from the seceding group, *which has a valid claim to it*."[67] Moreover, because the Baltic States were forcibly annexed by the USSR, it would be illegitimate for the USSR to prevent the secession of Baltic States on the grounds that the USSR had made certain investments in the Baltic States.

> ...the USSR has no valid claim to the investment because of the circumstances under which the investment was made. (Analogously, if you force your way onto my land, take over my house, and then proceed to make improvements in it, I owe you no compensation for your investment when I finally succeed in expelling you.)[68]

There are two, inter-related things that should be noted about Buchanan's argument here: (a) once again, Buchanan is *assuming* that the secessionists possess a valid claim to the territory they covet; and (b) even if we put to one side the question of who has legitimate title to the territory in question, there remains the prior question of *why*, under Buchanan's agent/trustee account of territorial sovereignty, forcible annexation is incapable of grounding a legitimate claim to territorial sovereignty. At least one theorist – Harry Beran – has claimed that Buchanan's account of legitimate territorial

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[65] Buchanan (1991), pp.112ff. Buchanan claims that in situations of discriminatory re-distribution the State *forfeits* its territorial sovereignty, whereas in the case of a lethal threat the State's territorial sovereignty is *overridden*. See Buchanan (1991), p.114.

[66] Buchanan (1991), p.110.

[67] Buchanan (1991), pp.113-14 [emphasis added].

[68] Buchanan (1991), p.107.

sovereignty collapses into a LD theory of secession. Beran questions Buchanan's claim that his agent/trustee account of territorial sovereignty supports the "...presumption that the *legitimate* territory of the State is to be kept intact."[69] If the State is merely the agent of the people, claims Beran, then this suggests that it is *the people* who collectively possess sovereignty over the territory. Thus, why can't "...part of the people sack the agent and appoint a new one, independent from the previous agent, in its part of the territory?"[70]

Similarly, the intuition which underpins the claim that forceful annexation cannot ground a claim of legitimate territorial sovereignty, and which is also evident in Buchanan's home-invasion analogy above, appears to be the same as that which also underpins the LD theory, i.e. *the absence of consent*. Consider, for example, the case of the Baltic States which Buchanan regards as a relatively straight-forward case of a group possessing a right to secede because they had their territory unjustly taken from them in the past. What matters from a moral point of view is that the Baltic States were *forcibly* incorporated into the USSR, i.e. against the wishes of (a majority of) the inhabitants of the Baltic States. Had (a majority of) the citizens of the Baltic States consented to Soviet rule then, *ceteris parabis*, presumably there would be no more question of their permissibly seceding from the USSR than there is of, say, the former East Germany seceding from modern-day, unified Germany to which it voluntarily acceded. Similarly, in the case of Buchanan's uninvited home handyman, it is Buchanan's lack of consent to the occupation of, and repairs to, his house that is the morally significant factor and which invalidates any claim for restitution by his unwanted visitor.

The question is: would the Baltic States have been justified in seceding if they had explicitly consented to Soviet invasion and rule? Analogously, would Buchanan still not owe compensation to his repairman had he agreed to the repairs being done to his house (for a fee) but then refused to pay him/her for the work that s/he had done? If the answer to both questions is 'Yes', then it must be something *other* than the simple lack

[69] Buchanan (1991), p.109 [emphasis added].

[70] Harry Beran, 'The Place of Secession in Liberal Democratic Theory' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994), p.61. Also see Scott Boykin, 'The Ethics of Secession' in *Secession, State and Liberty*, ed. D. Gordon (New Jersey: Transaction

of consent which justifies the secession of the Baltic States and Buchanan's refusal of restitution. The question, however, is *what*? If, on the other hand, the answer is 'No' then presumably it is the mere lack of consent which is doing the moral work, and which justifies the secession of the Baltic States and Buchanan's financial recalcitrance. The former response indicates that Buchanan's theory of legitimate territorial sovereignty is, at best, incomplete, whereas the latter reduces his theory of secession to a LD theory.

To summarise: if a territory's secession is to be morally justified then it must be shown that the secessionists – not the State – have legitimate title to that territory, and this requires a theory of legitimate territorial sovereignty. On the one hand, Buchanan's claim that legitimate territorial sovereignty resides with the people and that the State is merely the agent of the people, would explain why forcible annexation of a territory by an aggressor State against the wishes of that territory's inhabitants is insufficient to ground a claim of legitimate territorial sovereignty on behalf of that State. Additionally, these same considerations of popular sovereignty and the associated notion of consent would also explain Buchanan's assumption that, in cases such as that of the Baltic States, legitimate sovereignty resides with the inhabitants of the disputed territory as opposed to some other third party. Furthermore, such an account would also encompass the other two types of situations in which Buchanan believes a group's secession would, *ceteris paribus*, be justified, i.e. people are no more likely to consent to being the victim of practices of discriminatory re-distribution or genocide than they are to invasion by a foreign aggressor.

On the other hand, however, acceptance of the notion of popular sovereignty as the basis for legitimate territorial sovereignty raises a problem for Buchanan's rejection of LD theories in favour of a comparatively restrictive JC theory. Buchanan wants to grant a right of secession only to those groups who are victims of the three types of injustice specified by him. However, if the people possesses sovereignty to a territory in the manner described, then what matters is that they consent to the authority of the State. Moreover, there is no reason to suppose that people would withhold their consent or, having already consented, subsequently withdraw their consent, only in

Publishers, 1998), p.76.

situations of discriminatory redistribution, genocide and unjust incorporation. Thus, Buchanan must either: (a) explain why, if the people possess sovereignty as his agent/trustee account of territorial sovereignty suggests, their lack of consent to political authority is sufficient to justify a right of secession only in cases of unjust incorporation, discriminatory redistribution and genocide; or (b) acknowledge that because sovereignty resides with the people the simple absence of consent is sufficient to ground a right of secession and, thus, his is a LD, rather than a JC, theory of secession.

Returning to the case of Kashmir: if Kashmir's secession is justified by reference to India's forcible acquisition of the State, then this suggests that India's position in Kashmir is illegitimate because it never received, and has yet to receive, the popular consent of Kashmiris. In other words, the claim is one of procedural, rather than rectificatory, injustice. The significant thing is that Kashmiris never consented to Indian rule and, indeed, have explicitly dissented to Indian rule; not that they are punishing India for its past actions.[71] Thus, the claim that Kashmir possesses a right to secede is premised, not upon considerations of rectificatory justice but, rather, on the same sorts of considerations of popular sovereignty which underpin the LD theory. If, however, this is the case, then it is unclear why the ARJ cannot simply be dispensed with and the claim that Kashmir possesses a right to secede assessed solely in LD terms.

E. The Broken Promise Argument

The same considerations of popular sovereignty described above are similarly evident in the claim that India lacks sovereignty over Kashmir because it has failed to honour its promise to hold a plebiscite in which Kashmiris might freely determine their political fate. It should first be noted, however, that this claim is also not as straightforward as what it might initially appear. Aside from the question of whether the promise is regarded as a legal or a moral undertaking, there is the additional question of to *whom* the promise was made – Pakistan and/or the Kashmiri people – and who is the bearer of the obligation created by the promise, i.e. Nehru or the Indian State. Is

[71] Compare with Boykin, p.77.

the promise to hold a plebiscite in Kashmir an undertaking by the Indian State – in which case did Nehru have the (legal) authority to bind India to such a commitment? – or was it simply a personal assurance by Nehru?

This is not to deny that one might, on the basis of the unfulfilled promise of a plebiscite, construct a *moral* argument for Kashmir's secession or that such an undertaking would be a philosophically commendable one. However, any such argument would need to be linked into a larger project which, amongst other things, provided a philosophical defence of promissory obligations that addressed considerations such as: (a) how an agent can create an obligation by the mere process of wishing or declaring to have one; (b) whether a promisor can place other, third parties under an enforceable obligation by making a promise; and (c) what considerations are capable of defeating a promissory obligation.[72]

It should also be noted that the promise of a plebiscite – presuming, of course, that such a promise was ever made and is still valid – included only the option of staying within India or joining Pakistan; it did *not* include the third option of seceding to create an independent State of Kashmir. Thus, the simple failure by India to abide by its promise of a plebiscite cannot be employed to justify Kashmir's political independence. This is not to say that Kashmiris might not possess a right to collectively determine their political destiny by means of a plebiscite that *includes* the option of independent Statehood. However, such a right cannot be grounded in India's failure to fulfil a promise to allow them to do so when no such promise was ever made. Rather, if Kashmiris possess a right of secession that *includes* the option of independent Statehood, then the right of Kashmiris to secede must be grounded in considerations *other* than the Indian promise of a plebiscite.

One might, of course, claim that the right of Kashmiris to independent Statehood is a fundamental right which they possess irrespective of any promise by India to allow them to secede. In other words, in order to demonstrate that Kashmiris possess a right to secede to create an independent Kashmiri State there is no need to first demonstrate

[72] On such issues see Michael H. Robins, *Promising, Intending and Moral Autonomy* (Cambridge: Cambridge University Press, 1984); and P. S. Atiyah, *Promises, Morals, and Law* (Oxford: Clarendon

that India promised Kashmiris their own State, and then subsequently failed to fulfil that promise, in order to show that Kashmir has a right to secede from India as an independent political unit. Rather, the simple desire of a majority of Kashmiris for political independence from India is sufficient to ground a *prima facie* right of independent Statehood. This, however, renders the ARJ redundant by reducing the argument to a LD one where the right to secede is predicated, not upon the injustice of a broken promise but, rather, the injustice of holding a group captive against their will.

Moreover, to claim that India lacks legitimate sovereignty over Kashmir because it failed to abide by its promise of a plebiscite is to endorse India's authority to make such a promise as legitimate. It is, *a fortiori*, to acknowledge that India possessed legitimate sovereignty over Kashmir at the time that it made the promise. Conversely, if India *never* possessed legitimate sovereignty over Kashmir, or did not do so at the time of its promise of a plebiscite, then it cannot have legitimately made a promise to transfer that sovereignty and, thus, failure to adhere to a promise to do so cannot be employed to justify a contemporary right of Kashmiris to secede. To emphasise: one cannot legitimately promise to transfer a right – in this case a right of legitimate territorial sovereignty – which one does not first possess. Therefore, to claim that Kashmiris have a right to democratically determine their political future by means of a plebiscite exclusively because India promised them a right to do so, is to endorse India's claim to territorial sovereignty over Kashmir at the time of its promise as legitimate.

This, in turn, raises the question of from where India – which, having gained independence on 15 August 1947, had itself only been in existence as a political entity for a matter of a few months – obtained sovereignty over Kashmir. One possible response is to claim that, in accordance with the legal provisions governing princely States in the partition of the Indian sub-continent, legitimate sovereignty was *transferred* to India by the Maharaja of Kashmir, Hari Singh. However, as was noted earlier, to sanction Hari Singh's sovereignty over Kashmir is to reject liberalism by endorsing the authority of an autocratic despot who conspired against the majority of his subjects in order to maintain an environment characterised by immense social,

Press, 1981).

economic and political inequities. If, on the other hand, legitimate sovereignty was *not* transferred to India by Hari Singh then where *did* India obtain this sovereignty from?

F. Conclusion

It needs to be borne in mind that JC arguments are *not* a distinct type of secession theory. Rather, *all* normative theories of secession premise a right of secession upon the perpetration of injustices and may therefore be said to be JC theories. Rival theories will, however, differ over exactly what injustices are sufficient to ground a right of secession and, thus, under what conditions a State's authority over a given group is deemed to be illegitimate. The three JC arguments above, for example, premise the right of Kashmiris to secede upon the injustices of a failure to adhere to certain provisions, unjust incorporation and a broken promise. Similarly, a consent-based LD theory premises a right of secession upon the injustice of enforced rule against the wishes of a majority of a sub-group's members, whereas a Nationalist theory premises the right to secede upon the injustice of one nation holding another nation captive in the same State. Consequently, because so-called JC theories are not a separate type of secession theory, they cannot be singled out as possessing a property that makes them both distinct from, and superior to, other, alternative types of theory.

Consider, for example, Brilmayer's defence of the importance of territory to theories of political obligation and secession. Existing theories of political obligation, claims Brilmayer, take the voluntary performance of a specific action – e.g. accepting benefits provided by the State, continued residence in a State, explicit consent to a State's authority etc. – as sufficient to justify a duty of obedience to a specific State,[73] without first explaining *why* the sovereign is entitled to conclude that performance of these actions amounts to assuming an obligation to obey.[74] England, for example, cannot infer an obligation on the part of English subjects from their residence or entry upon the land known as England, unless England already possesses legitimate territorial

[73] Providing, of course, certain conditions are met, e.g. with respect to consent arguments: (a) individuals must be aware of the situation and that consent is being requested; (b) there must be a reasonable period of time for expression of dissent; (c) it must be clear by what point any objection must be made; (d) it must be reasonably easy to express consent; and (e) the consequences of dissent must not penalise such expressions. See A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), pp.64ff.

sovereignty over that land. Brilmayer terms this the *bootstrapping objection* and claims that if consent arguments are to work then they must be coupled with a prior account of territorial acquisition, rather than simply presuming the very State power which they attempt to justify.[75] Similarly, argues Brilmayer, any right to secede must also be explicated in terms of territorial sovereignty, i.e. when a group seeks to secede, "...it is claiming a right to a piece of land, and one must necessarily inquire into why it is entitled to that particular piece of land, as opposed to some other piece of land – or no land at all."[76]

As the example of Kashmir clearly demonstrates, however, the bootstrapping objection is not restricted to consent theories alone, and hence cannot be employed to demonstrate the relative superiority of so-called JC theories. England cannot infer obligations of English subjects from their consent to English authority without first explaining how it acquired sovereignty over the territory of England. Similarly, however, Kashmiris cannot premise a right to secede upon the injustice of India's broken promise to hold a plebiscite without first explaining from where India originally obtained sovereignty over Kashmir and, thus, the authority to make such a promise.[77] Correspondingly, to claim that Kashmiris possess a right to secede because India failed to abide by the provisions governing the accession of the princely States, is also to raise the question of from where the authority of these provisions is derived. The same difficulty also exists with Nationalist theories, i.e. to claim that a nation is entitled to a particular piece of land *qua* its status as a separate nation, begs the question of what the source of that nation's title is and why it is entitled to *that* piece of land as opposed to an alternative piece of land, or no land at all.

Brilmayer, however, endorses the unjust incorporation variant of the ARJ and claims that a sub-group *can* successfully establish title to the territory it covets – and, thus,

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[74] Lea Brilmayer, *Justifying International Acts* (New York: Cornell University Press, 1989), p.77.

[75] e.g. how did England acquire sovereignty over a piece of territory such that it may claim that persons who consent to England's authority there are subject to its legitimate exercise of power? See, for example, Lea Brilmayer, 'Consent, Contract and Territory', *Minnesota Law Review*, Vol.74, No.1, 1989., p.12.

[76] Brilmayer, (1991), p.201.

[77] To repeat: one cannot promise to transfer a right – here a right of legitimate territorial sovereignty – which one does not already possess.

possess a right to secede – by demonstrating that: (a) its land was acquired through conquest by the State from the group wishes to secede; or (b) a third party with no stake in the current dispute improperly joined the territories of the separatist group and the parent State.[78] However, to claim that a group is entitled to a piece of land because it was unjustly seized by another party is itself to presuppose a prior account of territorial acquisition. As in the case of Buchanan's argument from unjust incorporation mentioned earlier, Brilmayer simply *assumes* that the separatist group already possessed legitimate title to its territory at the time of the territory's seizure, without offering an account of how that group initially acquired the territory. Yet, we cannot presuppose that the secessionists are the legitimate owners of the seceding territory, when it is exactly this question of territorial ownership that the theory is supposed to address in the first place.

In conclusion, then, the case of Kashmir supports the claim that JC theories are not a distinct type of secession theory. Thus, because *all* normative theories of secession may equally be described as JC theories, JC theories cannot be singled out as possessing a property which makes them distinct from, or superior to, other, alternative forms of theory. The question, then, is not whether JC theories are superior to other, different types of secession theory but, rather, which JC theory is superior to all other JC theories.

6.5 THE LIBERAL-DEMOCRATIC CASE FOR KASHMIR'S SECESSION

A. Introduction

In Chapter Four it was pointed out that whether or not there exists a LD right for a group to secede depends upon what type of liberalism we are operating under: (a) a Rawlsian model in which a liberal society is defined as one which is comprised of so-called 'liberal' communities that adhere to ideals of individual equality and autonomy;

[78] Brilmayer cites the case of the Baltic States as an example of the former scenario and East Pakistan's (present-day Bangladesh) war of secession with West Pakistan as an example of the latter scenario. These two types of argument, claims Brilmayer, "...can be used to demonstrate that current state boundaries are illegitimate and that secessionists have a superior claim to the land they seek." See Brilmayer (1991), p.190. A similar argument is advanced by Buchanan (Buchanan (1991), p.67) although, as was noted in Chapter Three, there are also significant differences between these two theorists in terms of the conditions which each takes as sufficient to establish a valid territorial claim.

or (b) a form of liberalism premised upon the toleration of dissent. Under the former type of theory a group's secession is unjustified unless: (a) it adheres to ideals of individual equality and autonomy; (b) its secession would create an environment which, from a liberal perspective, is superior to that which obtained prior to the act of secession;[79] and (c) other, less extreme, measures of achieving this environment are, at least in the short to medium term, unavailable. Where a group manages to meet these three, rather onerous, conditions then, *ceteris paribus*, we might conclude that that group has a moral right to secede.

Conversely, if a liberal society is defined as one that may be comprised of 'illiberal' communities then it becomes comparatively easier to justify a group's session. The important thing under this model of liberalism is the toleration of dissent, i.e. the right to secede no longer needs to be explicated in terms of a quantitative/qualitative increase in the ability of individuals to live their lives from the inside. Rather, if a group is prepared to allow its members a right of exit – which may, or may not, take the form of secession – then, as an expression of (political) dissent, the mere assertion of a desire to secede is sufficient to ground a *prima facie* right of secession.

Because such an enterprise would require a more comprehensive analysis than can be undertaken here, no attempt has been made to argue for one type of liberalism – and, by extension, LD theory – as being more satisfactory than the other. Rather, it was simply pointed out that in selecting one of the two forms of LD theory one is forced to choose between: (a) the prioritisation and enforcement of principles of individual rights and equality; or (b) a plebiscitary right of secession that includes the right to establish illiberal States. The purpose of the following discussion is to apply these two forms of liberalism to the case of Kashmir. The intention is to demonstrate that, because the number of groups which qualify for a right to secede under each type of theory may be substantially less than at first might appear, neither type of will theory yield the simple plebiscitary right of secession favoured by Beran and other LD theorists.

[79] i.e. an environment in which individuals are able to live their lives from the inside – according to their own views about what gives meaning to life – more effectively.

While the objectives of some Kashmiri separatist groups such as the JKLF might, at a very basic level, be said to mirror the simple plebiscitary right of secession advanced by the LD theory, these groups never specify which of the above forms of liberalism they prefer. This observation should not be construed as a critical comment upon Kashmiri separatists for failing to participate in a philosophical debate with liberal political theorists. Rather, the intention is simply to point out that because Kashmiri separatists operate in a world governed more by considerations of *Realpolitik* than philosophical principle, they typically have other things on their mind than the contextualisation of their political aims within complicated theoretical disputes between foreign academics. Because, however, under the LD model so much hinges on which type of liberalism one is operating under, if we are to assess the demands of Kashmiri separatist groups in LD terms, then clearly some determination has to be made as to what type of liberalism is being appealed to in order to justify Kashmir's secession.

One possible approach is to look separately at each of the Kashmiri separatist and, based upon their stated objectives and political ideologies, ask which of the above two types of liberalism they might prefer. This, however, runs the risk of putting words into peoples' mouths and consequently mis-representing their position. Moreover, regardless of whether or not the JKLF would prefer, say, a Rawlsian model of liberalism to that favoured by Kukathas, from a purely theoretical perspective the real issue is whether or not Kashmir's secession can be justified by reference to these two types of liberalism. Thus, the best solution is to look separately at each type of liberalism in the context of Kashmir with a view towards determining: (a) whether or not each model of liberalism is capable of justifying a right for Kashmir to secede; and, if so, (b) what practical and theoretical difficulties the example of Kashmir poses for the model.

B. Common Arguments For & Against an Independent Kashmir

Before going on to examine the linkages between the case of Kashmir and the two types of LD theory here under consideration, it will first be helpful to examine some common arguments regarding Kashmir's proper political status. All parties to the Kashmir dispute attempt to legitimate their respective claims by advancing various

reasons why Kashmir should, or should not, be afforded a right of secession. By examining how these arguments relate to the two LD theories here under consideration and what, if any, credence should be afforded these claims, we may eliminate a source of possible confusion and be in a better position to more competently consider the LD case for Kashmir's secession.

One common argument against granting Kashmir political independence from India is the claim, briefly introduced above, that Kashmir's secession would seriously undermine Indian secularism and democracy by initiating a religious bloodbath in India and/or legitimating the claim that Muslims are disloyal to India. It is a matter of little dispute that typically a group's secession has wide-reaching implications that may extend, not only to the parent State, but also to other, third parties. Consequently, it may also be claimed that while secession may *increase* the ability of the members of the seceding group to live their lives from the inside, it may nonetheless produce an even bigger *decrease* in the ability of others to do the same. In other words, while Kashmiris might, from a liberal perspective, be better off with their own State, their secession may nonetheless produce an overall decrease in the ability of individuals to live their lives from the inside by undermining democracy and secularism in India and the region as a whole.

There are, then, two questions we need to ask of this argument against granting Kashmir a right to secede: (a) is there really a causal connection between Kashmir's secession and the stated negative consequences and, if so; (b) are these negative consequences morally sufficient to override any right of Kashmiris to secede? On the one hand, the sociological effects of a group's secession upon liberal institutions and practices in the nascent, remainder or any other State are, from a liberal perspective, an important factor in determining whether a group possesses a right to secede. Clearly no liberal theory of secession should sanction a right to secede in situations where the exercise of that right would effectively undermine liberal institutions and practices by creating an environment of extreme disorder and violence. Moreover, there are those who genuinely fear that Kashmir's secession would provoke a violent anti-Muslim backlash in India. Such people see the violent anti-Sikh riots in New Delhi that followed the assassination of Indira Ghandi in 1984 and the horrors of partition as

precedents that could well be repeated on an enormous scale were Kashmir to break away from India.[80]

On the other hand, however, there may also be a self-fulfilling character to such assertions. To assume that Kashmir's secession would necessarily be followed by widespread violence is also to perpetuate that violence by creating an expectation of disorder. This in turn erases any sense of accountability amongst the perpetrators of violent acts by encouraging the belief that, rather than being responsible for their actions, they are instead helpless participants in an historical inevitability.

Yet, far from being an unavoidable outcome, any violence that followed Kashmir's secession may, to a significant degree, be the result of manipulation by certain elites seeking to further their own political ends. Certain groups such as Hindu nationalists and Muslim extremists derive considerable political advantage from communal violence in India. By organising and perpetrating a Hindu-Muslim apocalypse in the event of Kashmir seceding, these groups may strengthen their position by legitimating the claim that a secular India with a sizeable Muslim minority is untenable. In this context one may also recall the State-sponsored violence in East Timor which both preceded and followed that country's 1999 independence referendum. Far from being unavoidable or spontaneous, there is considerable evidence to suggest that this violence was instead largely orchestrated by factions within the Indonesian political and military establishment to both exact punishment upon the East Timorese, and to send an unambiguous message to other secessionist-inclined regions within Indonesia.[81]

Similarly, if the goal is the maintenance of Indian secularism and, by extension, democracy, then it is unclear why giving in to the illiberal threats of, say, Hindu fundamentalists is in the long-term an effective strategy for accomplishing that end.

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[80] Author interviews with George Verghese, who claimed that Kashmir's secession would make the genocide that occurred in Bosnia and Rwanda "look like a picnic" (details above); Harinder Baweja (Senior Correspondent, *India Today*), New Delhi, 6 November 1998; and Maj. Gen. (Retd.) Dipanker Banerjee, New Delhi, 3 November, 1998. Also see Ganguly, pp.128-29; and Varshney, p.198.

[81] See, for example, *Report of the UN Secretary General to the Security Council and General Assembly*, Agenda Item No.96, U.N. Doc. A/54/654 13 December 1999; Amnesty International News Release ASA21/202/99, 28 October 1999; and *The Washington Post*, 21 March 2000.

Rather than preserving Indian secularism and democracy such tactics may instead hasten their demise by further entrenching and empowering the sectarian enemies of liberalism. Indeed, Hindu extremists within the BJP and their political allies such as the RSS arguably pose more of a threat to Indian secularism and democracy than would the secession of Kashmir or, for that matter, any other region within the Indian Union.

Another common argument against an independent Kashmir is the claim that, initially at least, such an entity could not be economically or militarily self-sufficient and, thus, would require the cooperation of both India and Pakistan, neither of which want to see an independent Kashmir. Indeed, in addition to Kashmir's importance to both countries' respective national identities, strategically both India and Pakistan potentially stand to lose a great deal through any realignment of their mutual border in Kashmir. For example, the main lines of communication and defence for Ladakh run through the Valley. If the Valley were to secede from India then India's strategic position *vis-à-vis* Ladakh would be considerably weakened.[82] Moreover, both countries fear that the precedent set by a successful and prosperous independent Kashmir might encourage other, secessionist inclined regions within their borders to follow suit and also secede.

The claim, then, is that regardless of the moral justifiability of Kashmir's secession, the unpleasant truth is that neither Pakistan nor India would permit Kashmiris to secede and create an independent State. Moreover, were such an entity created then both countries would do their best to undermine it and thwart the successful operation of liberal-democratic institutions within it. Thus, it makes little sense to talk of a right of independent Statehood for Kashmir – and, by extension, of Kashmiris governing themselves in a liberal manner – when the geo-political realities in South Asia mean that neither eventuality is ever likely to come to pass.

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[82] See Gowher Rizvi, 'India, Pakistan and the Kashmir Problem 1947-72' in *Perspectives on Kashmir*, ed. Raju G. C. Thomas (Boulder: Westview Press, 1992), p.65; and Ganguly, p.141. The 1962 Sino-Indian war demonstrated just how vital these lines of communication and supply are to the Indian position in Ladakh. The only available alternatives are the airfield in Leh and the 500km Leh-Manali road. The former is of arguably limited strategic value given its vulnerability to enemy attack and climatic conditions which frequently render it inoperable, while the latter is not a suitable supply route for a major

Whatever the truth of such claims, however, the unwillingness of both India and Pakistan to tolerate an independent, democratic State of Kashmir *cannot* legitimately be a determinant in whether or not Kashmiris possess a moral right to secede. It is one thing to speculate upon the capacity of Kashmiris to govern themselves in accordance with the precepts of liberal democracy, and to deny them a right of secession because of their comparative inability or unwillingness to do so. It is quite another thing, however, to deny Kashmiris a right to secede, not because they are unable or unwilling to govern themselves in a liberal-democratic manner, but because others refuse to allow them the opportunity to do so. Indeed, to deny Kashmiris a right to independent Statehood because of Indian and Pakistani threats to undermine any such State is itself to create an illiberal state of affairs by rewarding the threat of the performance of illiberal actions. Rather, if Kashmiris possess a right to secede and create an independent State, then it must be a right held irrespective of Pakistani and Indian acquiescence. To suggest otherwise is to legitimate the illiberal actions of the morally indigent by reducing rights to mere privileges bestowed by the more powerful and omnipotent.[83]

Finally, there is the issue of outside assistance and aid as a determinant in a group's right to secede. Numerous theorists have raised doubts about the political and social environment that would obtain in an independent State of Kashmir and questioned whether or not such a State would be capable of enduring as a liberal democracy. These claims will be addressed in greater detail shortly. For now the important point to note is that if Kashmir's right to secede is dependent upon it securing an overall increase in the ability of individuals to live their lives from the inside, then Kashmiris are unlikely to possess a right to secede if they cannot govern themselves in a liberal-democratic manner where individuals are able to live their lives according to values of their own choosing.

In response to this objection it may be claimed that, while there are, indeed, good reasons to be sceptical about the prospects of liberal-democracy in an independent Kashmir, many of these difficulties could be overcome with outside intervention and

army for similar reasons.

[83] See the discussion of perverse incentives in Chapter Three.

assistance. If India were to simply cut Kashmir adrift then, of course, political and social life in Kashmir may disintegrate into a state of affairs approximating a Hobbesian state of nature. If, on the other hand, the international community offered aid and assistance in much the same way as it has done in Bosnia, Kosovo and East Timor, then the outcome of political independence may be radically different and the prospects of liberal-democracy in Kashmir substantially enhanced.

Three things should, however, be noted in response to this counter-argument. First, the respective situations in Bosnia, Kosovo and East Timor immediately prior to international intervention were markedly worse than that which currently obtains in Kashmir – thus lessening the likelihood of international intervention in Kashmir. Second, while international intervention may have halted most of the immediate violence in these three territories, in many respects the jury is still out on whether or not it has been an effective means of securing long-term democratic reform. Third, while India, Pakistan and other countries may have a *negative* obligation to refrain from sabotaging Kashmir's political fortunes by undermining its democratic institutions of government, it is by no means apparent that they have a *positive* obligation to ensure the success of those same institutions or, given the forces at work in Kashmiri political life, that they could even if they wanted to.

Pro-separatist Kashmiris are often wont to speculate upon the desirability of international intervention and the opportunities that it would provide both to Kashmir's, and their own, political and economic fortunes. In the wake of the American-led invasion of Kuwait in 1991 many Kashmiris, in their political *naiveté*, were convinced that it was Kashmir's turn next.[84] However, not only is it doubtful that in the event of Kashmir's secession international assistance would be forthcoming and, if so, to what degree, but it is also unclear that such assistance would necessarily increase the long-term prospects of democratic governance in Kashmir. In the absence of a morally enforceable claim to, or, at the very least, a credible guarantee of, such

[84] This was a common refrain in September 1991 during which time I first visited Kashmir. Many Kashmiris were, perhaps understandably, convinced that the momentum provided by certain international events such as the fall of the Berlin Wall and the Gulf War made Kashmir's eventual political independence at the hands of the United Nations an historical inevitability.

assistance, pro-secessionist arguments predicated upon the generosity of the international community are, at best, whimsical and, at worst, absurd.

C. Rawlsian Liberalism & Kashmir's Secession

If we adopt a Rawlsian version of liberalism of the type favoured by theorists such as Kymlicka, then the justifiability of Kashmir's secession is dependent upon it creating a state of affairs which, from a liberal perspective, is superior to that which would obtain were Kashmir to remain as a constituent component of India. In other words, it must be shown that Kashmir's secession would produce a quantitative and/or qualitative increase in the ability of individuals – not necessarily just Kashmiris – to live their lives from the inside. Therefore any new State created by Kashmir's secession must be based upon principles of individual equality and autonomy which grant individuals certain rights that override other, opposing considerations and which proscribe the subordination of the interests of the individual to those of the larger group of which s/he is a member.

This latter consideration immediately rules out the sort of fundamentalist Islamic State favoured by some Kashmiri separatist groups which would subordinate individual liberty to Islamic imperatives or, more accurately, *their highly controversial interpretation* of Islamic imperatives. Similarly, while one might under this type of liberalism attempt to justify Kashmir's secession to Pakistan, such an argument would, at best, be problematic given that Pakistan is a military dictatorship with a comparatively poor record of: (a) economic, social and political justice; (b) human rights; and (c) tolerance towards religious minorities and sub-nationalities. Despite the many failings of the Indian State, it is highly questionable whether the long-term prospects of liberal democracy in Kashmir would be any better were Kashmir to secede from India in order to join Pakistan. In view of these factors we may, therefore, restrict discussion to how the creation of an *independent* State of Kashmir might be justified under a Rawlsian version of liberalism. There are, then, two questions to be addressed: (a) in what sense might Indian rule in Kashmir be said to be illiberal; and (b) would an independent Kashmir be any more liberal than the *status quo* of Indian rule in Kashmir?

With respect to the former question Kashmiri separatists often point to the serious human rights abuses perpetrated by occupying Indian troops against ordinary Kashmiris, as indicative of the fundamentally illiberal nature of Indian rule in Kashmir and attitude of the Hindu establishment towards (Kashmiri) Muslims.[85] The problem with such an argument, however, is that there may be less extreme measures which would be at least as effective as the creation of an independent Kashmiri State in securing a decrease in incidences of brutality suffered by ordinary Kashmiris, e.g. more effective enforcement of human rights and monitoring of Indian troops in Kashmir. Moreover, such an argument suffers from the same flaws, and is back-to-front in the same way, as a definition of Kashmiri nationhood or an ANSP based upon Indian atrocities discussed above.[86]

Civil rights abuses by Indian troops in Kashmir aside, the Indian State nonetheless suffers from numerous malfeasances that in many respects render it a malignant and iniquitous entity. Here we should begin by noting that India is, at least nominally, a secular State governed in accordance with the precepts of liberal-democracy. Like all such States, however, India doesn't always live up to the ideal standards of liberal-democratic theory. Not surprisingly, then, while the impressive achievement of more than half a century of almost uninterrupted democratic rule in India should in no way be deprecated nor overlooked, it should come as no surprise that India's political landscape is often blighted by serious inter-group violence and transgressions of human and democratic rights.

Indeed, instances of mis-government and violation of individual democratic rights are not only ubiquitous across all of India, but are often so serious as to beggar belief. For example, one of the key requirements of a liberal theory of justice – the right to a swift and fair trial – is formally guaranteed by article twenty-one of the Indian constitution, while the *Criminal Procedure Code* requires an arrested person to be produced before a magistrate within twenty four hours of arrest. In practice, however, the police frequently avoid these requirements by failing to record an arrest. Consequently, some

[85] Author interviews with Yasin Malik; and Prof. Abdul Ghani Bhatt (details above).

[86] i.e. it is incoherent to ascribe a right of secession on the basis of negative consequences suffered by Kashmiris as an outcome of their trying to exercise a right to secede which they never in fact possessed.

inmates – so-called 'under-trials' – have spent up to eleven years languishing in jails all over India simply waiting to be officially charged with an offence.[87]

India also contains a large number of territorially concentrated and ethnically diverse cultural and linguistic communities which are frequently hostile to central rule. These factors combine with high levels of illiteracy and poverty, vast disparities of wealth and religious conflict – both between different religious sects (e.g. Hindu versus Muslim and Sikh conflicts) and within them (e.g. conflicts between different Hindu castes and conflicts between Sunnis and Shias) – to create an enormous number of conflicting interests that make India an extremely problematic State to govern. Indeed, one of the most fundamental conflicts within Indian society, and which was responsible for the sub-continent's partition in the first place, remains the often violent antagonism between Hindus and Muslims.[88] Kashmiris, as members of the only Muslim-majority State in Hindu-dominated India, often feel themselves to be at the cutting edge of this conflict. Separatist leaders in Kashmir, not to mention many ordinary Kashmiris, frequently cite Hindu discrimination as one of their main reasons for wanting to secede in much the same way that Jinnah advanced similar arguments to justify the creation of Pakistan more than half a century ago.[89]

On the one hand, then, there is a great deal of truth to the claim that India is far from being a modern liberal State. On the other hand, however, as real and arduous as Indian mis-governance, corruption, ineptitude and discrimination may be, the real question is whether or not an independent State of Kashmir would be any better at respecting and enforcing ideals of individual autonomy and equality. What reason is there to believe that a Kashmir ruled by Kashmiris would be any more liberal than a Kashmir ruled by India?

There is also the difficulty that many human rights abuses in Kashmir are perpetrated by security forces indigenous to the State – an issue which will be explicated in greater detail shortly.

[87] See, for example, Shyamala Shiveshwarkar, 'The Plight of Prisoners', *The Hindustan Times*, 5 January, 1999.

[88] See, for example, Peter Van Der Veer, *Religious Nationalism* (Berkeley: University of California Press, 1994).

[89] Author interviews with Yasin Malik; Prof. Abdul Ghani Bhatt; and Mirwaiz Umar Farooq (details above).

Numerous scholars have raised doubts regarding the internal stability of an independent State of Kashmir. Cognisant of the ethno-regional divisions which have historically precluded a shared cultural, social and political understanding between the different peoples of Jammu, Kashmir and Ladakh, these theorists have questioned whether existing communal problems would not simply be replicated within the newly created polity.[90] Similar considerations might also be said to be applicable to an independent State consisting only of the Valley. Historically much of the mis-government in Kashmir has been perpetrated, not by federal agencies but, rather, by State agencies indigenous to Kashmir. For example, it will be remembered that there is considerable evidence to suggest that, since it first assumed power in 1951, the National Conference has regularly violated democratic and human rights in Kashmir.

Furthermore, many of the atrocities committed in Kashmir are perpetrated by organisations which are indigenous to the State. For example, since taking over from the Indian military as the main counter-insurgency force in Kashmir, the Jammu and Kashmir Police (JKP) have been the subject of continuous and serious allegations of impropriety.[91] The Jammu and Kashmir traffic police, for example, have recently gained notoriety as one of the most corrupt law-enforcement forces in India[92] – quite a substantial accomplishment given the pervasively venal nature of the Indian constabulary. These same security agencies would presumably also be the main instrument of law enforcement in an independent State of Kashmir. Hence, if the problem is the high number of incidences of human rights abuses perpetrated by the various security forces deployed in Kashmir, then there seems little reason to suppose that secession from India would necessarily be an effective means of securing a quantitative and/or qualitative decrease in such abuses. Rather, the solution must be the substantive reform of these forces and institution of effective mechanisms of accountability.

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[90] See, for example, Hewitt, pp.192-93. A similar opinion was also expressed to me in person by George Verghese (details above).

[91] One of the more serious examples of such behaviour occurred on 3 April 2000 when the Special Operations Group of the JKP and the Central Reserve Police Force (a federal law-enforcement agency) opened fire on a group of protesters in Anantnag. The protesters were demanding the release of seventeen males whom they alleged had been kidnapped by the JKP. See, for example, '7 Killed, 11 Injured in Firing on Precessionists', *The Kashmir Times*, 4 April 2000.

[92] See Arun Joshi, 'Pilgrim Fleecing: A New Danger en route to Vaishno Devi', *The Hindustan Times*, 3 January, 1999.

It may, of course, be claimed that it is precisely *because of* Indian interference that Kashmiris have proven unable to put their own house in order. In other words, the historical failure of liberal democratic institutions in Kashmir is not indicative of an enduring inability on the part of Kashmiris to govern themselves according to liberal-democratic precepts. Rather, it is simply further evidence of the illiberal nature of Indian rule and the need for full political independence from India to ensure the effective institution of liberal-democratic rule in Kashmir. However, it seems implausible to blame India for *all* the problems in Kashmir. Moreover, even if Kashmir's less-than-perfect past record of liberal democratic governance *were* the result of Indian interference, it does not necessarily follow from this that an independent Kashmir would necessarily be any better at respecting liberal-democratic norms than the *status-quo* of Indian rule.

Is there any reason to believe that things would be different in an independent State of Kashmir? Given that Kashmiris have been largely unable to achieve liberal democratic government with the relative security and affluence afforded by their position as a State within the Indian Union, why should we assume that they would be capable of doing so as an independent, sovereign State with all the adversities that would accompany that independence? Counterfactually, given the political and geo-strategic complexities that exist both in Kashmir and in the region as a whole, this is an extremely difficult question to answer with any degree of certainty. On the one hand, definitive predictions regarding the prospects of (liberal-democracy in) an independent Kashmir should be treated with the scepticism and disdain that such claims to divine knowledge deserve.

On the other hand, however, at the very least there are good reasons to question whether an independent Kashmir would be any more liberal than a Kashmir under Indian rule. Aside from the historical precedents of illiberal rule and infringements of human rights discussed above, other factors which militate against a liberal, independent Kashmir include: (a) the political instability and violence that exists both in the region as a whole and within Kashmir; (b) the easy availability of advanced weaponry; (c) the economic difficulties an independent Kashmir would encounter at least in the short to medium term; (d) the factious, violent nature of Kashmiri political

life; and (e) the almost total absence of a democratic culture and history of responsive government in Kashmir.

Clearly there are wider issues to be addressed here regarding the relationship between the likely sociological consequences of change and an analysis which stresses abstract rights as such. For present purposes, however, it will be sufficient to note that under this type of LD theory an *uncertainty factor* may need to be included within the calculation of consequences that indicates a preference for maintaining the existing borders of the parent State. While in some instances where things are fairly straightforward this uncertainty factor may be weighted relatively low, in other instances – such as that of Kashmir – where things are not so unequivocal, this uncertainty factor may be a more dominant, even the deciding, factor in the calculus. This in turn will further diminish the number of groups capable of qualifying for a right to secede under this type of liberalism, i.e. even if a group is trapped within an illiberal State with no immediate prospect of achieving liberal reform, because of the difficulties in assessing the consequences of that group's secession, it may still be unjustified in seceding.

D. A Second Form of Liberalism & Kashmir's Secession

In Chapter Four a second form of liberalism premised upon the toleration of dissent, rather than ideals of individual autonomy and equality, was introduced and contrasted with the more mainstream, Rawlsian account dealt with above. Because, however, Beran explicitly rules out the creation of an illiberal State and there is good reason to suppose that other LD theorists would also be hostile to such a proposition, it was merely pointed out that this second form of liberalism is not germane to the LD theory considered in Chapter Four. Nonetheless, simply because the theory is not pertinent to the position adopted by Beran and other theorists like him, is not also to say that the theory itself is necessarily unsatisfactory. We may agree that Beran would reject the theory without also concluding that the theory is thereby inadequate.[93] The purpose of the following discussion is, then, to briefly take a closer look at this type of LD theory

[93] Alternatively, to put it rather crudely, just because Beran and these other theorists reject the theory does mean to say that we should too.

in the context of the Kashmir dispute by comparing it to the former type of theory discussed earlier.

The first thing we should note about this second form of liberalism is that it largely avoids the epistemic difficulties inherent in the former approach. The important thing here is not the consequences of a group's secession but, rather, that individuals take part in a way of life willingly and thus have a right of exit. Whereas, under the previous form of liberalism, in order to possess a right to secede a group had first to demonstrate that its secession would produce an overall increase in the ability of individuals to live their lives from the inside, no such requirement is necessary under this form of liberalism. Rather, to deny a group the right to secede and maintain a political union by force is to fail to tolerate that group's expression of (political) dissent which is, by definition, an illiberal act. Thus, the mere expression by a group of a desire to secede is sufficient to ground a *prima facie* right of secession as an act of dissension to the political *status-quo*.

Consequently, under this form of liberalism in order to ground a right for Kashmir to secede it is necessary only to show that (a majority of)[94] Kashmiris favour leaving India and this, it would seem, would be a *comparatively* easy task. Furthermore, under this theory a liberal society *may* contain 'illiberal' communities that place very little value upon individual equality and autonomy, and which subordinate the interests of the individual to those of the community. Therefore, whereas a theory of secession based upon Rawlsian liberalism necessarily rules out the creation of the sort of authoritarian, sectarian State favoured by Islamist groups such as the *Jamaat-i-Islami*, such a State would be legitimate under this form of liberalism providing, of course, that it allowed its members a right of exit.

This, however, raises the question of what counts as a right of exit and under what conditions an individual is un/free to leave. There is also the further difficulty that the freedom to exit a group may itself be dependent upon other, prior forms of autonomy which may not be present within some illiberal communities. Kymlicka, for example,

[94] The incorporation of a majoritarian thesis within both forms of the LD theory and the problems that this raises will be discussed in greater detail in the following chapter.

points out that an individual may lack the necessary pre-conditions for making a meaningful choice about whether to exit the group, e.g. because they have been denied an education or the freedom to associate with others outside the group.[95] Alternatively, financial barriers or lack of a favourable alternative to which one might emigrate may also constrain an individual's choice to leave. Thus, while an individual may not be forcibly prevented from leaving or associating with others outside the group, they may still nonetheless lack the ability to exercise their right of exit.

The important point, then, is that because the freedom to exit a group is itself dependent upon some prior form of autonomy this creates a problem where, whether by accident or design, this autonomy is lacking. In such situations not only will the community be unable to foster a right of exit, but individuals will be unable to make a meaningful choice to exercise it. Hence, while individuals may nominally possess an enforceable claim against the group to be permitted to leave, in practice the right of exit will be substantively empty. Moreover, if, as Kukathas suggests, cultural communities should be left alone to manage their own affairs – regardless of what we may think of their way of life – then we cannot force communities to provide the necessary pre-conditions for individuals to be able to make a purposeful decision as to whether or not to leave the group. Ironically, then, the principle which the theory champions – i.e. the toleration of dissent and ability of cultural communities to manage their own affairs – may conflict with the principle's concomitant requirement that we leave groups alone to live their lives as they prefer, particularly in situations where members of the group do not retain the ability to live as *they* prefer by exiting the group.

Indeed, Kukathas acknowledges that some individuals may be so settled in their community's way of life and ignorant of alternatives, that they are unable to make a meaningful choice to stay or leave because the idea of exit is inconceivable. Nonetheless, he believes that it is "...not clear that this is objectionable if one's concern is the freedom of the individual to live as he or she prefers."[96] The issue,

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[95] Will Kymlicka, 'The Rights of Minority Cultures: Reply to Kukathas', *Political Theory*, Vol.20, No.1, 1992, p.143.

[96] Kukathas, Chandran, 'Cultural Rights Again: A Rejoinder to Kymlicka', *Political Theory*, Vol.20, No.4, 1992, p.678.

however, is not whether individuals should: (a) be free to live as they prefer; or (b) have a coercive authority impose life-style choices upon them against their will. Rather, the issue is *under what conditions* individuals can be said to be living as they prefer. To simply claim that one who does not express a desire to leave their community is therefore living as he or she prefers, is to overlook a variety of factors which may render an agent unfree.

For example, an individual who has been indoctrinated, or even brain-washed, by, say, a religious cult may express a strong desire to remain within the cult and, thus, may in some sense be said to be 'living as they prefer' while they are permitted to remain within the group. However, while that individual may not be forcibly prevented from leaving or associating with others outside the group, because of the control exercised by the group over his/her environment and formative influences, it would not be completely correct to describe that person as being entirely free to leave. Typically we do not consider decisions made in such situations as morally being on a par with decisions which are the result of considered reflection where one is in possession of all the relevant facts.

This is not to suggest that illiberal, pro-secession groups active in Kashmir such as the *Jamaat-i-Islami* will necessarily fail to qualify for a right to secede under this type of liberal theory. Whether or not these groups lack the pre-requisite conditions for their members to be able to make a meaningful choice to leave will depend upon exactly what those pre-conditions are.[97] A comprehensive examination of these pre-conditions, and whether or not each of the pro-secession groups in Kashmir is capable of satisfying them, is clearly beyond the scope of the present project. The important point, however, is that simple coercion and forcible restraint are not the only means by which an agent may be rendered unfree to leave a group.

Rather, to make consensual membership the sole determinant of a group's legitimacy requires that we look beyond simple coercion as a source of individual unfreedom and address the many pre-conditions of the freedom to choose whether to stay or go. Thus,

at the very least, the requirement that individuals be free to live as they prefer and not forcibly prevented from leaving or associating with outsiders requires further clarification. Moreover, the number of groups capable of qualifying for a right of secession under this theory may also be substantially reduced, depending upon what criteria a group must fulfil in order for its members to have an effective right of exit.

E. Conclusion

In Chapter Four it was pointed out that those who favour a LD theory of secession find themselves in something of a dilemma. If, on the one hand, the LD theorist adopts a Rawlsian conception of liberalism like that favoured by Kymlicka, then a right of secession must be explicated in terms of an increase in the ability of individuals to live their life from the inside. Consequently, any right to secede will be limited to those groups unfortunate enough to find themselves trapped in an illiberal State for whom secession is the only available option for securing liberal reform in the short to medium-term. In other words, while this form of liberalism may, indeed, be capable of justifying a right to secede, it is a heavily restricted right that applies to relatively few groups over time. This is in contrast to the simple plebiscitary right of secession advocated by LD theorists such as Beran, which grants a *prima facie* right to secede to any group in which a majority of individuals favour secession.

If, on the other hand, the LD theorist adopts a version of liberalism like that favoured by Kukathas, then the mere expression of a desire for political independence will be sufficient to ground a *prima facie* right to secede. However, because this version of liberalism also extends a right of secession to groups which engage in illiberal, authoritarian practices, the price for such a freely available right of secession is the legitimation of States which do not value individual autonomy and equality, and where the only enforceable claim citizens have against their government is to be allowed to exit. The dilemma, then, is whether to: (a) allow a relatively unrestricted right of secession that includes the right to secede from liberal States, but which also justifies the creation of illiberal States; or (b) enforce ideals of individual autonomy and

[97] i.e. only once we have determined in what circumstances a group's members are free to leave, can we then examine particular groups in order to determine whether they in fact allow their members an effective right of exit.

equality by denying illiberal groups the right to establish illiberal States, while at the same time limiting the right to secede to a relatively small number of groups trapped in illiberal States.

In the case of Kashmir it has been noted that, while it remains extremely difficult to foretell with any degree of accuracy exactly *what* the consequences of Kashmir's secession might be, there are nonetheless good reasons to doubt whether Kashmir's secession would result in an overall increase in the ability of individuals to live their lives from the inside. Consequently, it is far from obvious that Kashmir's secession would be justified under the former, Rawlsian type of liberalism. Moreover, given the inherent risks and uncertainties of secession, in cases such as Kashmir the prudent course of action may well be to maintain a State's territorial integrity – particularly in cases where a group's political independence is likely to result in only a marginal increase in the ability of individuals to live their lives from the inside.

Conversely, the second type of liberalism largely avoids the epistemic difficulties inherent in the former approach. Under this version of liberalism there is no longer any need to engage in counter-factual reasoning, or to calculate the consequences of a group's secession upon the ability of individuals to live their lives from the inside. Rather, the simple expression of a desire to secede is sufficient to ground a *prima facie* right of secession. However, because, under this type of theory, a group must allow its members a right of exit in order to qualify for a right to secede, this raises a wider question of under what conditions one is free to leave a group. Hence, in order to qualify for a right to secede not only must a group refrain from forcibly preventing its members leaving, but they must also ensure that their members have the ability to make a meaningful choice to remain or leave.

In conclusion, then, the case of Kashmir not only corroborates the previous claims made in Chapter Four but also strengthens them by highlighting new difficulties faced by each type of LD theory. Previously it was claimed that, rather than the freely available right of secession envisaged by Beran, a Rawlsian form of liberalism will instead justify only a heavily restricted right of secession that is likely to apply to relatively few groups over time. By emphasising some of the epistemic difficulties

inherent in a right of secession predicated upon this form of liberalism, the case of Kashmir demonstrates how the number of groups likely to qualify for a right to secede under this type of theory may even smaller than at first thought.

Similarly, in the case of the latter type of LD theory, it was shown that, because an effective right of exit is dependent upon other, prior forms of autonomy, the requirement that groups allow their members a right of exit entails more than a simple absence of coercion and forcible restraint. Moreover, because a right of exit is a pre-requisite to possession of a right to secede under this form of theory, this will also reduce the number of groups which possess a right of secession. Consequently, it seems that neither form of liberalism will yield the simple plebiscitary right of secession favoured by Beran, in which the mere expression of a desire to secede by a simple majority of a group's members is sufficient to justify a *prima facie* right to secede.

7

CONCLUSION

7.1 INTRODUCTION

Before continuing any further it will be beneficial to first re-state the purpose of the thesis and take an overview of what has been achieved so far. The objective of the thesis, it will be remembered, is to critically evaluate the liberal case for a moral right to secede by assessing the three types of theory which currently dominate the contemporary literature on such a right. Hence, the thesis aims to critically engage with, and say something substantive about, the three leading normative theories of secession within the context of the larger question of how liberalism should respond to demands by minorities for a moral right to secede.

Having summarised and critically evaluated these three theories in the first four chapters of the thesis, the case study of Kashmir was then introduced and applied to each theory. The primary purpose of including this case-study within the thesis is to illustrate and test-out the general criticisms made in Chapters Two, Three and Four by examining how these may be corroborated with empirical evidence from a real-life secessionist dispute such as that which exists in Kashmir. A much less-developed, but nonetheless important, aim is to look at some of the various claims advanced by the various parties to the dispute in Kashmir with a view towards determining how a liberal theory should respond to such claims and, thus, what broader lessons might be learned from the case of Kashmir for the normative theorisation of secessionist demands.

The goal of the thesis is, then, not to: articulate a satisfactory account of a moral right to secede; normatively evaluate claimed rights to secede in Kashmir; or examine the reasons behind the political violence in Kashmir. Rather, the more modest goal is the

critical assessment of the three theories under consideration with the case of Kashmir employed as illustrative material to this end. This, however, is not to say that the investigation contained within the thesis is necessarily irrelevant to these undertakings. Indeed, any explanation of the causes of the Kashmir conflict and eventual solution to it will not only have to take account of the conflicting demands of the various protagonists in the dispute, but also arrive at some determination regarding their justifiability, or legitimacy. Similarly, by critically examining the three leading theories of secession, and some of the broader lessons which might be learned from the case of Kashmir for the normative theorisation of secessionist claims – issues which any satisfactory theory will need to address – the thesis both advances the debate over a moral right to secede while at the same time also indicating the direction in which the debate might next proceed.

7.2 NATIONALIST THEORIES OF SECESSION

A. The Critique of Nationalist Theories of Secession

The first of the three types of theory considered in this thesis – i.e. Nationalist theories – claims that a right to secede is possessed exclusively by certain groups of people called nations *qua* their status as a separate nation. In Chapter Two it was claimed that Nationalist theories of secession are unsatisfactory because they are unable to: (a) both distinguish nations from other, similar social entities and different nations from one another; and (b) show why nations – and *only* nations – should be afforded a right of independent Statehood. Of these two claims the former was applied to the case of Kashmir and the question asked, 'How might Kashmiris coherently be described as a nation?'

One way of defining the nation is by reference to certain objective criteria such as a common language, culture, ethnicity and history. Following the work of previous theorists,[1] discussion of these objective definitions of nationhood focussed upon *external* difficulties with such criteria and how, for example, to distinguish New

[1] See, for example, Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), p.49 and 'Secession and Nationalism' in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Oxford: Basil Blackwell, 1993).

Zealand English – and, thus, national identity – from, say, Australian English and national identity. Intuitively, we want to say that – despite their many similarities – countries such as New Zealand and Australia are founded upon distinct national identities. Because, however, the English spoken in these two countries is, by-and-large, very similar, it is difficult to see how a linguistic definition of nationhood could justify anything other than a larger *Australasian* nation that incorporated both States. Moreover, because linguistic, cultural, ethnic and historical distinctiveness are all matters of degree, there is also some difficulty in identifying a threshold of distinctiveness without being completely arbitrary where we draw the line between, for example, two dialects of the same language and two different languages.

Similar difficulties also exist with a subjective account of national identity premised upon factors such as a shared consciousness, or sense of self-identity, and the solidarity that these create. While a subjective account enjoys certain advantages over a purely objective analysis, it too raises the same threshold problem identified above, i.e. given that a shared consciousness and solidarity are both matters of degree, how much of each of these factors must a group exhibit in order for it to qualify as a separate nation? Moreover, as Beran has noted: "The nation cannot be the group which has the highest degree of mutual sympathies because this would not even be the people of [the city of] Leuven but individual families."[2] Finally, further difficulties arise when we consider that individuals may feel no affiliation with any existing nation, identify to varying degrees with two or more nations, and/or change their national affiliations over time either to another national group or simply to no such group at all.

B. Applying the Critique of Nationalist Theories to the Case of Kashmir

In Chapter Six these conclusions were analysed in the context of the Kashmir dispute. This discussion demonstrated that similar difficulties to those noted earlier may also exist *internal* to each of the above objective criteria. Thus, in addition to the problem of how to *narrow* these criteria to exclude other, related peoples *outside* of the target group, there is also the conflicting problem of how, at the same time, to *broaden* the definition in order to accommodate all the variances that may exist *within* the target

[2] Harry Beran, 'Border Disputes and the Right of National Self-Determination', *History of European*

group. If, for example, language is the yardstick of Kashmiri national identity then in order to a yield a Kashmiri nation that encompasses the residents of the Valley, not only must Kashmiri be defined in a manner that distinguishes it from other similar tongues, but such a definition must also be broad enough to encompass all the various dialects of Kashmiri spoken within Kashmir.

It is difficult to see how these two mutually opposing aims might both be satisfied within the same definition. Indeed, as it happens *no* definition of Kashmiri could include *all* the inhabitants of the Valley; Sikhs, Gujjars and Bakarwals do not speak Kashmiri and so will necessarily be excluded from a linguistically defined Kashmiri nation. Moreover, in order to accommodate the various dialects of Kashmiri spoken *within* the Valley, a linguistic definition of Kashmiri national identity must necessarily be so broad as to also include certain groups who reside *outside* of the Valley, who speak a dialect of Kashmiri,[3] but who have no real connection or sense of shared identity with Kashmir and its inhabitants. Therefore, a linguistic account of national identity is incapable of yielding a wholly Kashmiri nation. Rather, such a definition will be: (a) so narrow as to yield a series of geographically concentrated nations within the Valley whose members each speak a distinct dialect of Kashmiri; or (b) so broad as to include groups of people who reside outside of the Valley.

Because this linguistic heterogeneity is replicated within Kashmiri society to a similar degree with respect to the variables of ethnicity, history and culture, there seems little reason to suppose that a definition of Kashmiri nationhood based upon these other objective factors would fare any better than a linguistic definition of Kashmiri nationhood. For example, just as Sikhs, Gujjars and Bakarwals would fail to qualify as Kashmiris under a linguistic definition of Kashmiri national identity, because they are also ethnically, historically and culturally distinct from so-called 'ordinary Kashmiris',[4] any definition of Kashmiri nationhood premised upon these three variables would also exclude them from being classed as Kashmiris.

Ideas, Vol.16, No.4-6, 1993, p.482.

[3] e.g. Kashtawari/Kishtawari speakers in Doda, and Poguli speakers in Pogul.

[4] See Sukhdev Singh Chib, *This Beautiful India: Jammu and Kashmir* (New Delhi: Light and Life, 1977), p.94; Somnath Dhar, *Jammu and Kashmir* (New Delhi: National Book Trust, 1977), p.23 and *Jammu and Kashmir Folklore* (New Delhi: Marwah Publications, 1986), p.23; and Frederic Drew, *The Jummoo and Kashmir Territories* (Delhi: Oriental Publishers, 1971), pp.109-111.

Furthermore, just as Kashmiris share certain linguistic traits with other peoples who reside outside of the Valley, the same is also true of the additional variables of a common ethnicity, culture and history. Over the centuries Kashmiris have been both the beneficiaries and victims of an enormous degree of foreign influence and conquest. The upheavals and discontinuities produced by this process of outside influence and invasion render any appeal to a common history, ethnicity or culture as the basis of a purely Kashmiri national identity extremely problematic. Aside from the various historical, cultural and ethnic dissimilarities that exist within Kashmir, many of the distinctive traits that set Kashmiris apart from others in the region (e.g. their distinctive brand of Islam and handicrafts of carpet and *papier mâché* making) were imported from outside of Kashmir, particularly Persia. Thus, if cultural and historical continuity are taken as the benchmarks of national identity, then residents of modern-day Iran would likely qualify as Kashmiris ahead of Kashmiri Sikhs, Gujjars and Bakarwals. This is despite the fact that Sikhs, Gujjars and Bakarwals have lived in Kashmir for centuries and are generally regarded by themselves, and others in Kashmir, as being Kashmiri.

With respect to a subjective definition of nationhood it will be remembered that, because a shared consciousness and solidarity are also matters of degree, there is a general problem identifying how much of each of these factors a group must exhibit in order for it to qualify as a nation. It will also be remembered that within Kashmiri society there are strict social divisions according to profession, education and family background which are significant determinants of personal identity and social status.[5] Finally, there is also a cleavage, not to mention some mild hostility, between urban Kashmiris in Srinagar and those Kashmiris who reside in rural areas. Kashmiris in Srinagar often tend to view their rural counterparts as illiterate and uneducated simpletons, whereas rural Kashmiris often tend to regard the inhabitants of Srinagar as aloof and elitist.[6] These social divisions combine with the urban/rural divide to render any Kashmiri national identity premised upon subjective criteria subordinate to class and local identities. Thus, rather than generating a single Kashmiri nation that

[5] See Maharaj K. Koul, *A Sociolinguistic Study of Kashmiri* (Delhi: Indian Institute of Language Studies, 1986), pp.22-24; and Henny Sender, *The Kashmiri Pandits: A Study in Cultural Choice in North India* (Delhi: Oxford University Press, 1988), pp.22-24.

[6] Author interviews with Dr Amitab Mattoo (Professor of International Relations at *Jawaharlal Nehru University*), New Delhi, 9 November 1998; and Praveen Swami (Senior Correspondent and Bureau Chief for *Frontline* magazine), New Delhi, 3 November 1998.

incorporates *all* Kashmiris, a subjective account of national identity is more likely to produce a series of regionally or socio-economically defined nations in Kashmir.

There also remains the additional question of *why* Kashmiris might sympathise with one another as Kashmiris in a way that they do not with others. To claim that Kashmiris constitute a nation because they exhibit a degree of mutual sympathy and possess a shared consciousness, is also to raise the question of exactly what is the nature and source of this mutual sympathy and consciousness. One possible response is to appeal to the history of oppressive alien rule in Kashmir and claim that this tyranny has engendered a mutual identification and solidarity amongst Kashmiris as victims of foreign aggression. However, because such an account would also include other, similar victims of (Indian) aggression it is incapable of generating a purely *Kashmiri* nation. Indeed, ironically one might almost say that it actually provides an argument *in favour* of continued Indian occupation of Kashmir.

Moreover, even if it could be shown that Indian occupation and misrule has produced or exacerbated the desire amongst Kashmiris for political independence from India – and, in so doing, forged a specific identity amongst Kashmiris distinct from other victims of Indian misrule – there remains the additional question of *why* this means that Kashmiris have a right to secede. To show that Kashmiris have a *desire* for political independence from India is not also to show that they have a *right* to that independence and others a correlative obligation to grant it to them. Similarly, even if we set aside the objection that it is incoherent to premise a right on oppression suffered as a result of trying to exercise a right which one did not possess, there is the additional question of why, even if Kashmiris *are* a nation, this means that they are entitled to secede. Thus, in addition to defining what a nation is, the Nationalist theorist must also demonstrate why nations – and only nations – should be the exclusive bearers of a right to secede.

In Chapter Two the claim that there is a necessary connection between national homogeneity, democratic government and the provision of certain collective goods and schemes of re-distributive welfare was rejected. A sense of community and inter-personal networks of trust may well be prerequisites to the effective operation of

democracy and schemes of re-distributive welfare, however this does not mean that the nation is the only, nor the best, source of such features. Indeed, national homogeneity may instead facilitate a repressive orthodoxy that stifles – rather than encourages – democracy. Finally, the claim that individual well-being is dependent upon the flourishing of certain cultural groups was also found to be insufficient to demonstrate that nations should be the exclusive holders of a right of secession. Not only may a lesser degree of political self-determination than independent Statehood be sufficient to guarantee the flourishing of such groups, but there is no reason to suppose that the nation is the only, or the best, example of such a cultural group.

In relation to the case of Kashmir, it was also pointed out that a definition of Kashmiri national identity based upon Indian oppression conflicted with the liberal defence of nationalism given by theorists such as Miller, Nielsen, Kymlicka and Tamir. Typically these theorists see nations as pre-requisites to liberal-democratic institutions of government and individual freedom of choice. In other words, the effective operation of liberal institutions presupposes the existence of the types of inter-personal bonds which are characteristic of national communities. However, even if we put to one side the objection that there may be other forms of community that are able to fulfil these sociological functions at least as effectively as the nation, if national identity is premised upon a decidedly illiberal state of affairs characterised by misrule and oppression then the preservation of that national identity cannot be predicated upon liberal axioms. We cannot defend a nation's identity and right to independent Statehood by reference to a positive relationship to democratic governance and individual liberty, when that nation was both created by, and is dependent upon, a denial of the very democratic rights and individual freedoms which it is meant to sustain and augment.

C. Conclusion

A theory of normative nationalism must address two questions: (a) what, exactly, *are* nations; and (b) why should we be concerned about nations? A Nationalist theory of secession must also address the additional question of why this concern should necessarily take the form of granting nations an exclusive right to independent Statehood. Regarding the former issue, the case of Kashmir corroborates the claim

made in Chapter Two that the subjective and objective criteria employed by Nationalist theorists cannot satisfactorily distinguish nations from other, similar sociological entities and different nations from one another. Moreover, by demonstrating how an objective account of national identity entails mutually contradictory aims, the example of Kashmir also points to further difficulties faced by the Nationalist theorist in providing a satisfactory definition of the nation and, thus, bolsters the case against Nationalist theories.

If nations are to be the exclusive holders of a right to secede then not only must they be shown to possess a property, or set of properties, that distinguishes them from other, similar sociological entities and one another, but that property must also be relevant to, and not conflict with, the justificatory basis of the right. As the example of a Kashmiri national identity based upon Kashmir's history of oppressive alien rule clearly demonstrates, we cannot ground a right to secede upon liberal axioms while consistently claiming that nations – as the sole bearers of that right – may be fundamentally illiberal entities. Thus, the mutual dependency between the two difficulties of defining the nation and defending its right to secede further restricts the Nationalist's room to manoeuvre. To base a nation's right of political self-determination upon liberal axioms is to rule out appeal to illiberal definitions of nationhood and, thus, further complicate the difficulty of how to define national identity. Conversely, to define national identity by reference to, say, a history of oppression is to rule out a liberal defence of national self-determination and, thus, re-open the question of why nations should be afforded a right to secede.

7.3 JUST CAUSE THEORIES OF SECESSION

A. Introduction

A JC theory of secession is one which grants a right of secession to groups which are the victim of certain specified injustices. In other words, a State exercises legitimate authority – and, *a fortiori*, the State's subjects have no right of secession – as long as the State behaves in a just manner and its subjects are not the victims of injustice.[7]

[7] The two are not necessarily the same, i.e. some JC theorists maintain that a group may possess a right to secede because they are the victim of an injustice perpetrated by a party other than the group's parent

Conversely, when a sub-group within a State are the victims of a specified injustice for which secession is deemed to be an appropriate remedy of last resort, then the State loses legitimate authority over that sub-group and, consequently, the sub-group has a right to secede. Thus, to say that a group (G) has a right to secede exclusively because it is the victim of a certain injustice (I) perpetrated by, say, its parent State (S) is also to say that, counter-factually, had S not I-ed then S's authority over G would be legitimate and, thus, G would have no right to secede.

In Chapter Three the various arguments put forward by Buchanan in support of the relative superiority of JC theories – arguments from minimal realism, the avoidance of perverse incentives and moral/legal consistency – were considered and rejected. It was also pointed out that Buchanan's version of a JC theory is able to outscore other, rival theories by reference to these three criteria because it is highly restrictive and so justifies relatively few instances of secession. This, however, need not be true of *all* JC theories; JC theories may be relatively more or less permissive than alternative theories depending upon *what* injustices they take as sufficient to ground a right of secession. Hence, there is nothing inherent to the requirement that a group be a victim of an injustice in order to possess a right to secede that is necessarily supportive of the State's right to maintain its territorial integrity.

Furthermore, one could also imagine a comparatively restrictive Nationalist or LD theory which also justified relatively few instances of secession and which, when judged according to the three criteria listed above, would be at least as satisfactory as Buchanan's JC theory. Thus, even if we accept these three criteria as valid, it does not follow from this that JC theories are necessarily superior to Nationalist or LD theories, or that Buchanan's JC theory is the superior alternative amongst alternative JC theories. Indeed, if lack of permissiveness is the yardstick by which a theory's satisfactoriness is assessed, then it would seem that the only *truly* satisfactory theory can be that under which there is *no* right to secede.

State. See, for example, the argument from unjust incorporation advanced by Lea Brilmayer in 'Secession and Self Determination: A Territorial Re-Interpretation', *Yale Journal of International Law*, Vol.16, No.1, January 1991, p.190; and Buchanan (1991), p.67.

Buchanan also claims that LD and Nationalist theories are distinct from, and inferior to, JC theories because they are committed to the view that groups may secede from States which are 'perfectly just.'[8] The important issue for a normative theory of secession, however, is when a State commits the injustice of not allowing a group to secede. Moreover, to say that a group possesses a moral right to secede is also to say that that group's continued political union with its parent State is morally unjust, as are any attempts by the parent State (or other parties) to maintain that union. Hence, for all three types of theory *any* State that refuses to recognise a legitimately-held right to secede is by definition unjust, and the only difference between JC, LD and Nationalist theories are the *types* of injustice(s) which each regards as sufficient to justify a right of secession and, thus, render a State unjust. The disagreement, then, is not over whether a group should first have to be a victim of an injustice in order to possess a right to secede but, rather, *which* injustices are sufficient to ground such a right.

B. Applying the Critique of Just Cause Theories to the Case of Kashmir

In Chapter Six it was pointed out that, amongst the three arguments Buchanan identifies as sufficient to ground a right to secede, it is the argument from rectificatory justice (ARJ) that is pertinent to the case of Kashmir. It was further claimed that two different forms of the ARJ based upon different historical factors are applicable to Kashmir: (a) the circumstances surrounding the State's accession to India; and (b) the unfulfilled Indian promise of a plebiscite. The former argument was then broken down into two variants yielding three separate JC arguments for Kashmir's secession. These arguments and the critical assessment of them undertaken in Chapter Six may be summarised as follows.

1. The first variant of the former argument claims that India lacks legitimate sovereignty over Kashmir because it failed to adhere to the agreed provisions governing the accession of the princely States. Such an argument, however, cannot be employed to justify a right to independent Statehood for Kashmir. Furthermore, to claim that India lacks legitimate sovereignty over Kashmir because it failed to

[8] See Allen Buchanan, 'Theories of Secession', *Philosophy and Public Affairs*, Vol.26, No.1, 1997, pp.40ff.

abide by the rules and procedures governing Kashmir's accession, is to abandon liberalism by endorsing those rules and procedures as legitimate.

2. Similar considerations to those above are also germane to the claim that India lacks legitimate sovereignty over Kashmir because of its unfulfilled promise of a plebiscite. First, because the promise was only to allow Kashmiris the simple choice of staying with India or joining Pakistan, such an argument cannot ground a right to independent Statehood for Kashmir. Second, to claim that India lacks legitimate sovereignty over Kashmir because it failed to abide by its promise of a plebiscite is to acknowledge that India possessed legitimate sovereignty over Kashmir at the time that it made the promise and, thus, raise the question of from where India obtained this sovereignty.

3. Finally, the second variant of the former argument is based upon the use of force by India in its appropriation of Kashmir and appeals to what Buchanan terms 'unjust incorporation.'[9] Buchanan claims that under these circumstances "...secession is simply the reappropriation, by the legitimate owner, of stolen property."[10] However, we cannot simply *assume* that the secessionists are the legitimate owners of the seceding territory, when it is precisely this question of territorial ownership that the theory is supposed to address in the first place. Thus, the ARJ must be coupled with an account of legitimate territorial ownership, or sovereignty, that tells us in what circumstances legitimate title to a territory resides with the State or with a secessionist sub-group within the State.

These findings were then applied to Brilmayer's so-called 'bootstrapping objection' that consent-based theories of political legitimacy presume the very authority which they seek to justify by overlooking the need for an anterior account of territorial acquisition. As the example of Kashmir clearly demonstrates, however, Brilmayer's bootstrapping objection applies equally to all three normative theories and, thus, cannot be employed to single out JC theories as superior to LD and Nationalist theories. For example, a right of secession predicated upon the injustices of a broken

[9] i.e. annexation by either the existing State or by some earlier State that is the 'ancestor' of the currently existing State. See, for example, Buchanan (1991), p.67; and Brilmayer, p.190.

promise of a plebiscite, or a failure to adhere to certain provisions governing the accession of the princely States, also presupposes a prior account of territorial acquisition.

Similarly, Brilmayer's claim that a group possesses a right to secede if it was the victim of the injustice of unjust incorporation – i.e. forceful annexation – also calls for a prior account of how that group came to be the legitimate owner of its territory prior to the forceful seizure of that territory. To claim that a group is entitled to a piece of land because it was unjustly seized by another party is itself to presuppose a prior account of territorial acquisition. We cannot, as Brilmayer does, simply assume that a separatist group already possessed legitimate title to its territory at the time of the territory's seizure, when it is exactly this question of territorial ownership that the theory is supposed to address in the first place.

This once again re-visits the issue of territory and the role played by an account of legitimate territorial sovereignty in a normative theory of secession. In the contemporary world of territorial States a group's secession necessarily raises important issues regarding the proper division of territory. To grant a group a right to secede is also to grant that group a right to remove a portion of the State's territory and the assets contained within it. To settle such issues we need a theory of legitimate territorial sovereignty that addresses the question of what territory a seceding group is entitled to and why it is entitled to *that* territory as opposed to some other, alternative, territory.

As was noted in Chapter Four, however, there is no liberal reason why settlement of territorial issues need necessarily be anterior to the determination of whether or not a particular *group* possesses a right to secede. We may conclude that a group possesses a right to secede without first establishing exactly what territory that group can take with it when it secedes. Indeed, the simple requirement that a group possess legitimate title to a portion of the State's territory in order to hold a right to secede, merely succeeds in changing the question from when a group has a right to secede, to when a

[10] Buchanan (1991), p.67.

group possesses legitimate title to a portion of its parent State's territory, while bringing us no closer to a satisfactory answer to either question.

Here it is also useful to recall the earlier observation that one cannot adopt an illiberal definition of nationhood while at the same time premising a right for nations to secede upon liberal axioms. The same considerations are also applicable in the case of JC theories. For example, to claim that India lacks legitimate sovereignty over Kashmir because it failed to abide by the rules and procedures governing Kashmir's accession, is to abandon liberalism by endorsing those rules and procedures – and, thus, the authority of an authoritarian tyrant – as legitimate. One cannot predicate a right for Kashmir to secede upon a failure to abide by the provisions governing the accession of the princely States, while at the same time consistently maintaining a commitment to liberal axioms which directly conflict with these provisions. To emphasise: if secession is justified by the requirements of liberalism then the right to secede must be subject to those same liberal principles.

Similarly, any account of legitimate territorial sovereignty must also be consistent with the injustice(s) which the theory takes as sufficient to justify a right of secession. This is a problem faced by Buchanan who maintains that a group possesses a right to secede only if it is the victim of three particular types of injustice, while at the same time adhering to an agent/trustee account of territorial sovereignty[11] which suggests that territorial sovereignty rests with the people and, thus, part of the people can simply secede whenever they see fit.[12] Consequently, Buchanan must either: (a) explain why, if the people possess sovereignty, their lack of consent is sufficient to justify a right of secession only with respect to the injustices specified by him; or (b) acknowledge that the simple absence of consent is sufficient to ground a right to secede.

This is not to say that the Nationalist theory and Buchanan do not succeed in raising issues which are of significant importance to the development of a satisfactory normative theory of secession. For example, Miller's discussion of the necessary

[11] See Buchanan (1991), pp.108-114.

[12] See Harry Beran, 'The Place of Secession in Liberal Democratic Theory' in *Nations, Cultures and Markets*, eds. Paul Gilbert and Paul Gregory (Aldershot: Avebury, 1994), p.61; and Scott Boykin, 'The Ethics of Secession' in *Secession, State and Liberty*, ed. D. Gordon (New Jersey: Transaction, 1998),

sociological pre-conditions for the establishment and maintenance of a liberal-democratic society – i.e. the so-called Nationalist Democratic Argument (NDA)[13] – raises important questions regarding the likely sociological effects of a group's secession, and what consequences these may have upon liberal-democratic institutions. Similarly, Buchanan acknowledges that in order to function effectively democracy requires a 'minimal community' whose members have "*...enough* in common to be able to engage in meaningful participation in rational, principled political decision-making."[14] In the absence of this minimal community irreconcilable values and ways of conceptualising the social world will prevent individuals from together articulating a conception of the public good which both groups can agree upon.[15]

While these issues were discussed briefly in Chapter Six in relation to the question of whether an independent State of Kashmir could endure as a liberal democracy, there are clearly wider issues to be addressed regarding the sociological pre-conditions for the flourishing of liberal-democratic governance. Nevertheless, the important point remains that no liberal theory of secession should sanction a right to secede in situations where the exercise of that right would produce a net reduction in the quantity, or quality, of liberal-democratic rule by effectively undermining liberal institutions and practices in the nascent, remainder or any other State.

However, while the Nationalist theory is quite correct to stress the sociological effects of secession upon liberal-democratic institutions, it nonetheless fails to establish that the nation is the only, or the best, form of the so-called 'minimal community' necessary for the effective functioning of these institutions. Sentiments of mutual trust and consensus regarding important values and ways of conceptualising the social world may be exhibited by, say, religious communities and life-style groups to at least the

p.76.

[13] See, for example, David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), pp.96ff. Similar claims are also made by J. S. Mill, 'Considerations on Representative Government' in *Utilitarianism, Liberty, Representative Government*, ed. H. Acton (London: J. M. Dent, 1972), pp.363-64; and Ernest Barker, *National Character and the Factors in its Formation* (London: Methuen, 1948).

[14] Allen Buchanan, 'Democracy and Secession' in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 1998), p.23.

[15] Buchanan (1998), pp.23-24.

same degree as they are by nations.[16] Similarly, Buchanan also fails to show that granting a right of secession in situations other than the three injustices specified by him would necessarily undermine democratic rule.

C. Conclusion

All normative theories of secession premise the right to secede upon the perpetration of injustices with different theories taking different injustices, or types of injustice, as sufficient to justify a *prima facie* right of secession. The disagreement, then, is not over whether a group should first have to be a victim of an injustice in order to possess a right to secede but, rather, *which* injustices are sufficient to ground such a right and why those injustices – and *only* those injustices – should be taken as sufficient to ground a moral right to secede. In many respects, the three injustices which Buchanan regards as sufficient to ground a *prima facie* right to secede may be regarded as relatively straightforward and uncontroversial. Imagine, for example, a minority that is the victim of a sustained campaign of violence so serious that it threatens the group's very existence. Presuming that secession would be an effective remedy to this violence and that less extreme measures are unavailable or would be ineffective, most theorists would probably be inclined to agree with Buchanan that in order to preserve themselves the members of the group should be permitted to secede.

The difficulty for Buchanan, however, is to demonstrate why a right of secession exists *only* in situations such as the above, or where a group is the victim of discriminatory re-distribution or unjust acquisition. In recognition of this problem Buchanan appeals to the three criteria of minimal realism, the avoidance of perverse incentives and moral/legal consistency as well as the requirement that a group possess legitimate title to a portion of the State's territory in order to possess a right to secede. In Chapter Three, however, it was demonstrated that these criteria are incapable of establishing that Buchanan's theory is superior to other, more permissive theories. Rather, because JC theories fail to qualify as a separate type of theory, they cannot be differentiated from I.D and Nationalist theories as possessing a property that renders them a distinct and superior theoretical alternative. Nonetheless, Buchanan claims

[16] The response that the nation may be defined as whatever form of community that is the most conducive

that because LD and Nationalist theories are committed to the view that groups may secede from States which are 'perfectly just', they are both distinct from, and inferior to, JC theories. Yet, for all three types of theory *any* State that refuses to recognise a legitimately-held right to secede is by definition unjust, and the only difference between alternative theories concerns the *types* of injustice(s) which each theory regards as sufficient to justify a right of secession and, thus, render a State unjust.

In conclusion: the case of Kashmir supports the claim that JC theories are not a distinct type of secession theory. Rather, *all* normative theories of secession may equally be described as JC theories. Hence, instead of being a distinct theoretical alternative, Buchanan's theory is instead an example of one type of (JC) theory amongst many other, alternative types of JC theory that also includes LD and Nationalist theories. Thus, the disagreement is not over whether a group should first have to be a victim of an injustice in order to possess a right to secede but, rather: (a) *which* injustices are sufficient to justify such a right; and (b) why those injustices – and *only* those injustices – should be taken as sufficient to ground a moral right to secede.

7.4 LIBERAL-DEMOCRATIC THEORIES OF SECESSION

A. Introduction

Because the number of possible injustices which a group may suffer is practically limitless – extending to the indubitably trivial and absurd – so too is the list of possible theories of secession. One might, for example, premise a right to secede upon the ostensible injustice of being forced to learn French at High School, with the result that all individuals who involuntarily studied French during their formative years have a right to secede and create an independent State of Francophobes. If, however, the right to secede may be predicated on any number of purported injustices – some more fatuous than others – then the list of possible theories of secession is limited only by the number of possible injustices. Consequently it is implausible to critically assess *every* possible theory of secession. Rather, it makes sense to single out a select group of some of the more mainstream theories premised upon comparatively plausible types of injustice, and then ask whether any of these theories is capable of providing a

to the functioning of liberal-democratic institutions was rejected in Chapter Two.

satisfactory account of a moral right to secede. Thus, the scope of this thesis has been narrowed to focus upon the three theories which currently dominate the scholarly debate on a normative right to secede.

One type of theory which premises a right to secede upon the injustice of holding a nation captive in a multi-national State – i.e. Nationalist theories of secession – has already been rejected as unsatisfactory due to an inability to both distinguish the right-holder and demonstrate why nations, and only nations, should be entitled to such a right. Similarly, Buchanan's JC theory was rejected as incomplete because Buchanan remains unable to demonstrate that a right to secede exists only in cases of discriminatory re-distribution, a lethal threat or unjust incorporation. While Buchanan may well be correct to assert that we should recognise a moral right of secession in the case of these three injustices, the question remains why a liberal theory should not also recognise a right to secede in other instances premised upon the perpetration of alternative injustices.

This leaves the third, and final, type of theory – i.e. LD theories. LD theorists such as Beran and Gauthier premise the right to secede upon the liberal principle of individual self-determination which, they claim, grants each individual the right to freely determine their personal and political relationships. Consequently, these theorists claim that because the only just political associations are those which reflect the willingness of their members to associate with one another, if a group of individuals wish to leave an association by seceding then they should be permitted to do so. However, to premise a right of secession upon the liberal principle of voluntary political association is to beg fundamental questions about this principle and its justification within liberal political theory.[17] Why is it that liberalism necessarily entails a right for individuals to associate with whomever they choose to associate with?

By examining the linkages between the two issues of how liberalism should respond to demands for independent Statehood, and how it should respond to demands by

[17] Michael Freeman, 'The Priority of Function Over Structure: A New Approach to Secession' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.26.

minority groups for special recognition or preferential treatment, it was demonstrated that there are two ways of addressing this question and, consequently, two distinct types of LD theory. Under the first type of theory a liberal society is defined as one which is comprised of 'liberal' communities that uphold certain ideals of equality and individual autonomy that override other, opposing considerations. Conversely, under the second type of liberalism a liberal society is distinguished by its toleration of dissent and, therefore, may contain 'illiberal' communities that place very little value upon individual equality and autonomy in which the only enforceable claim the individual can make against the wider community is to be permitted to leave.[18] Whether or not there exists a (LD) right for a given group to secede will depend upon which of these two versions of liberalism one adopts.

B. Competing Versions of Liberalism

Under the former version of liberalism any right to secede must necessarily be explicated in terms of an increase in the ability of individuals to live their lives from the inside. Consequently, under this form of liberalism it is difficult to see how a group might possess a right to secede from a liberal State that respects and upholds the individual rights which this conception of liberalism gives rise to. Even if we acknowledge that different life plans will require different environments in which to flourish – and, thus, some liberal States will provide an environment more conducive to the effective realisation of a group's life plans than other liberal States – such considerations will in most cases be insufficient to justify a right of secession from a liberal State. A group may well be better off in a State whose institutions, policies and practices reflect their common beliefs and values. However, not only does secession usually come with prohibitively high attendant costs, but there may be other, less extreme means of furthering the ability of a group's members to achieve the liberal goal of self-authorship than secession.

Therefore the right to secede as understood by this former variant of liberalism will in most cases be restricted to groups trapped within illiberal States for whom secession is the only available option for securing liberal reform in the medium to long-term.

[18] See Chandran Kukathas, 'Are There Any Cultural Rights?' in *The Rights of Minority Cultures*, ed. Will

Liberals may still be able to produce pragmatic accounts of when secession should be permitted, e.g. in situations of serious inter-group conflict. However, secession in these cases is a second best option in response to a problem that arises as a result of the members of one group not respecting the liberal rights of the members of the other group.[19] Thus, a theory of secession based upon this form of liberalism is not only severely restricted in scope, but also finds itself in the paradoxical situation of addressing an issue – i.e. secession – which, if everyone accepted the theory (of liberalism), would not exist.

It may, of course, be objected that just because this type of theory grants a right of secession to relatively few groups over time, it does not follow from this that the theory is therefore unsatisfactory. After all, why should justifying many instances of secession be a criterion of satisfactoriness in the assessment of normative theories of secession? Indeed, there is no reason to suppose that a liberal theory should necessarily justify a lot, or even any, instances of secession. Rather, what matters is that the theory deals with the issue of secession in a coherent manner consistent with its underlying, justificatory principles. The important point for the present project, however, is that regardless of which of the two types of liberal theory one were to select, neither theory will approximate that preferred by Beran, Wellman or Gauthier.

These three theorists seek to both: (a) restrict the right to secede to those groups who are prepared to respect and enforce principles of individual autonomy and equality; while at the same time (b) claiming that the expression of a desire to secede by a majority of a group's members is sufficient to ground a *prima facie* right of secession. This, however, ignores the question of what liberal reason a group might have for seceding from a liberal State that respects and upholds principles of individual autonomy and equality. If the important thing is the ability of individuals to live their lives from the inside, then it is difficult to see how a group might possess a right to secede from such a State. Rather, the right to secede must be limited to groups trapped within illiberal States for whom alternative means of securing liberal reform are unavailable – a consideration which will apply to relatively few groups over time. One

Kymlicka (Oxford: Oxford University Press, 1995), pp.248-49.

[19] See Keith Dowding, 'Secession and Isolation' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.72.

cannot, as Beran seeks to do, both limit the right to secede to those groups who are prepared to respect principles of individual autonomy and equality, while at the same time claiming that the right extends to groups who wish to secede from a liberal State which respects and upholds these same principles. Therefore, the LD theory must either be substantially more limited in scope than LD theorists such as Beran suggest, or it must include the right to establish an illiberal State.

If, on the other hand, we adopt the second type of liberalism favoured by theorists such as Kukathas, then the most important thing is that dissent is tolerated and that one's views are not imposed upon others. This means that: (a) the right to secede no longer needs to be explicated in terms of individual autonomy and an increased ability to live one's life from the inside; and (b) where a sub-group wants to secede then to deny that group the right to secede and maintain the political union by force is to fail to tolerate that group's expression of dissent which is, by definition, an illiberal act. Hence, the mere expression of a desire to secede as an act of dissent to the political *status quo* is itself sufficient to ground a *prima facie* right to secede. However, while this second form of liberalism avoids the constraints that apply under the former variant of the theory, it does so at the price of legitimating authoritarian regimes that place little, if any, emphasis upon individual rights where people voluntarily elect to live in such a society.

Consequently, the LD theorist finds him/herself in something of a dilemma. To embrace the type of liberalism favoured by Kymlicka is also to limit the right of secession to those groups trapped in an illiberal State with no immediate prospect of achieving liberal reform. This, however, is a far-cry from a simple plebiscitary right of secession where only a simple majority in favour of secession is necessary to ground a *prima facie* right to secede. If, however, the LD theorist instead opts for the model of liberalism favoured by Kukathas then, while this will justify a plebiscitary right of secession based upon the simple desire to secede, it does so at the price of sanctioning 'illiberal' States which place little, if any, value upon individual autonomy and equality. Which is more important: (a) the prioritisation and enforcement of principles of individual rights and equality; or (b) a plebiscitary right of secession in which a

simple desire by a majority of the inhabitants of a territory to secede is sufficient to ground a *prima facie* right of secession?

C. General Findings From the Case of Kashmir for Liberal Theories of Secession

Earlier it was noted that there are two reasons for including the case-study of Kashmir within the thesis: (a) to test-out preceding analytical claims by examining how they stand-up when confronted with an empirical example of a secessionist dispute; and (b) to explore what broader lessons might be learned from the case of Kashmir for the normative theorisation of secession. This, latter objective entailed looking at some of the various claims advanced by the various parties to the Kashmir dispute and asking how a liberal theory should respond to these. This process yielded three general conclusions which may be summarised as follows.

First, depending upon their political agenda, certain groups may be unable to appeal to one or the other two types of liberalism mentioned above in order to justify a group's secession. Groups such as the *Jamaat-i-Islami* and *Lashkar-e-Toiba*, for example, see Kashmir's secession as part of a larger process of creating an Islamic State in South Asia that would subordinate the rights of individuals to their controversial interpretation of Islamic imperatives.[20] One could not, however, appeal to a Rawlsian version of liberalism that prioritises notions of individual autonomy and equality to justify the creation of such a State. Rather, if groups such as the *Jamaat-i-Islami* are to appeal to LD considerations in order to justify Kashmir's secession then their appeal must be limited to the second type of liberalism preferred by theorists such as Kukathas.

Second, one cannot – under either form of liberalism – appeal to considerations of *Realpolitik* based upon the unwillingness of others to tolerate a group's secession or subsequent flourishing, in order to legitimately justify withholding a right for that group to secede. According to the former variant of liberalism in order to possess a right to secede a group's secession must produce a quantitative/qualitative increase in the ability of individuals to live their lives from the inside. Consequently, it may be

[20] See, for example, Praveen Swami, The Kargil War (New Delhi: Left Word, 1999), pp.77-85.

claimed that where a group's secession would cause another party such as the parent State to behave in an illiberal manner – and, thus, create a state of affairs that, from a liberal perspective, is sub-optimal in comparison to that which obtained prior to the act of secession – then granting a right to secede would be unjustified. This, however, would allow States to effectively veto the right of minorities to secede simply by threatening to react in an illiberal fashion in the event of any attempt at political independence by a sub-group. Moreover, to deny a group a right to secede because others refuse to allow them the opportunity to do so, or threaten to undermine the State created by their secession, is itself to perpetuate a sub-optimal state of affairs by rewarding the threat of the performance of illiberal actions.

In the case of the second variant of liberalism things are even more clear-cut. Here what matters is the toleration of dissent and that we do not enforce our views upon others. If a parent State refuses to permit a sub-group to secede, or the State created by that sub-group's secession to flourish, then that State is refusing to tolerate that sub-region's expression of dissent by imposing a political union, or sub-optimal state of affairs, upon that group against their will – both of which are illiberal acts.

Third, while appeal to the consequences of a group's secession is permissible under the former variant of the LD theory, it is not so clear that appeal to post-secession violence perpetrated by others may necessarily be legitimately employed to deny a group a right to secede. Not only may such an argument be a self-fulfilling prophecy but, far from being unavoidable, such violence may be the result of manipulation by certain elites illegitimately seeking to further their own interests at the expense of others. Furthermore, the long-term prospects of secularism and liberal-democracy are unlikely to be enhanced by giving in to the illiberal threats of the enemies of liberalism. Thus, while a group's secession is, under the first variant of liberalism, unjustified if it results in an overall decrease in the ability of *individuals* – i.e. not just the seceding group's members – to live their lives from the inside, it does not follow from this that the threat of post-secession violence will necessarily be sufficient to override a right to secede.

D. Applying the Case of Kashmir to Liberal-Democratic Theories

Finally, there is the question of how the case of Kashmir relates to the critical analysis of LD theories undertaken in Chapter Four. Under the former variant of liberalism, the justifiability of Kashmir's secession is dependent upon it securing a quantitative/qualitative increase in the ability of individuals to live their lives from the inside. Here it was noted that it is extremely difficult to foretell with any degree of accuracy exactly *what* the consequences of Kashmir's secession might be. Hence, while India is far from being a modern liberal State, there are nonetheless good reasons to doubt whether an independent Kashmir would be any more liberal than a Kashmir under Indian rule. Moreover, given the enormous risks and uncertainties of secession, the prudent course of action may well be to maintain India's territorial integrity by denying Kashmir a right to secede. Thus, difficulties in calculating the consequences produced by a group's secession may further reduce the number of groups capable of qualifying for a right to secede under this type of liberalism.

In contrast, the latter form of liberalism largely avoids these epistemic difficulties by instead premising a right to secede upon the expression of a simple desire to separate from the parent State. Because, under this form of liberalism, the simple expression of a desire to secede is sufficient to ground a *prima facie* right of secession, there is no longer any need to engage in counter-factual reasoning by attempting to calculate the consequences of a group's secession upon the ability of individuals to live their lives from the inside. Whereas Kymlicka's liberalism requires that individual rights of autonomy and equality override all other considerations, Kukathas prefers "...to regard only the right of association (and dissociation) as paramount and to leave the terms of association to be determined by the community in question."[21] Thus, members of an illiberal group have the freedom to engage in illiberal practices – either as a minority within a larger State or as an independent State – while dissenting members within the group have the right to leave and enter another, alternative society.

Whereas some liberals may reject the freedom to found or join a group which engages in illiberal practices as no freedom at all, others may also claim that a refusal to

[21] Chandran Kukathas, 'Cultural Rights Again: A Rejoinder to Kymlicka', *Political Theory*, Vol.20, No.4, 1992, p.679.

acknowledge such a freedom is an unjustified imposition upon individual liberty. To deny the members of an illiberal, yet consensual, group the right to engage in illiberal practices is to restrict the voluntary lifestyle choices of individuals. Moreover, to be forcibly inducted into, or detained within, a group in which one's interests, liberties and welfare are severely diminished in order to benefit others is one thing. However, to freely abdicate one's rights of personal autonomy and equal respect while also retaining the right to re-claim these at a later stage by leaving the group is something altogether different. Thus, defenders of this second form of liberalism claim that, while their theory may indeed justify the subordination of an individual's autonomy and well-being, because: (a) this occurs only where individuals freely consent to such arrangements by not leaving the group; and (b) individuals retain the ability to rescind that consent and re-claim their rights by leaving the group, this is not really a problem.[22]

In the previous chapter it was pointed out that this in turn raises the question of under what conditions an individual is un/free to leave. Moreover, because the ability to make a meaningful choice to exit a group is dependent upon other, prior forms of autonomy, simply because an individual is not forcibly prevented from leaving or associating with others outside the group does not mean that the individual is therefore free to leave. Thus, because coercion and forcible restraint are not the only means by which an agent may be rendered unfree to leave a group, the requirement that individuals possess a right of exit is in need of further clarification.

Another, unresolved issue concerns whether an individual's right to leave extends to a right to secede and create their own State. This relates to issues raised in Chapter Four where it was noted that there is some difficulty with which Beran's LD theory begins with an emphasis upon the primacy of the individual – suggesting that each individual should have a right to secede – but then concludes with a collective right premised upon a majoritarian calculus. The former consideration suggests that the only legitimate political divisions are those which reflect the willingness of people to live

[22] On this form of liberalism and a defence of it against its critics see, for example, Kukathas (1992); Jeremy Shearmur, *The Political Thought of Karl Popper* (London: Routlege, 1996), pp.143ff; and Karl Menger, *Morality, Decision and Social Organization: Toward a Logic of Ethics* (Dordrecht and Boston: Reidel, 1974).

together and, thus, individuals retain a right of secession if they withdraw, or fail to give, their consent. In contrast, the latter consideration grants a right of secession only to groups in which a majority of members favour seceding from the parent State and, thus means that individuals may be forced to secede or remain within a State simply because they are a numerical minority within their group.

Kukathas writes in terms of individuals exiting the group and associating with others by exiting into another, pre-existing society. What is not clear, however, is whether this right of exit also includes a right for individuals to secede and form their own State. To make the right to secede a group right premised upon majoritarian considerations means the seceding group may include individuals who do not want to join the nascent State, or who at least view it as the least bad option. Similarly, the parent State may also contain individuals who wish to secede but who cannot because they are a minority within their group.

If, however, the important thing is that we tolerate dissent then it seems that we cannot compel individuals to secede or remain within a group simply because they are in the minority. Rather, if we are unjustified in maintaining a political union by force after a sub-group has expressed a desire to secede, then why should things be any different for an individual who wants to secede and create their own State? How can the liberal requirement that we tolerate dissent justify a right of secession for groups of individuals, but not individuals themselves? Indeed numerous theorists have claimed that it is inconsistent to include a majoritarian calculus in a theory premised upon individual axioms.[23] However, whereas some theorists such as Rothbard and Von Mises endorse a right for individuals to secede and create their own State,[24] other theorists explicitly reject such a proposition as a fantasy claiming that it would produce

[23] See, for example, Dowding, p.73; Robert W. McGee, 'The Theory of Secession and Emerging Democracies: A Constitutional Solution', *Stanford Journal of International Law*, Vol.26, No.2, 1992, pp.464-65; and Allen Buchanan, 'Self-Determination, Secession, and the Rule of Law' in *The Morality of Nationalism*, ed. Robert McKim and Jeff McMahan (New York: Oxford University Press, 1997), p.315.

[24] See Murray N. Rothbard, *Ethics of Liberty* (New Jersey: Humanities Press, 1982), p.181; and Ludwig Von Mises, *Nation, State and Economy* (New York: New York University Press, 1983) and *Liberalism* (New York: Foundation for Economic Education, 1985).

overwhelmingly negative consequences and that there are pragmatic limits to the size of States.[25]

Thus, once again, a theory of secession premised upon this second type of liberalism requires further clarification. If the theory grants a right to secede only to groups of individuals, then it must be shown how membership in these groups is to be determined and why this does not conflict with the individualistic premises of the theory. If, on the other hand, the theory endorses the right of individuals to secede on their own, then the objections that such a right would produce overwhelmingly negative consequences and ignores pragmatic limitations of the size of States must be dealt with.

7.5. CONCLUSION

A right of secession calls into question fundamental issues regarding the contemporary world of States, the justice of existing international borders and the entitlement of individuals, or groups of individuals, to a right of political self-determination. The role of a normative theory of secession is to specify who possesses a right to secede and why. Holders of a right to secede must therefore be singled out as possessing a property, or set of properties, which distinguishes them both from other holders of the right, and also from those who do not possess the right. Each of the three theories considered in this thesis employs a variety of different properties, or characteristics, to pick out candidates for a right of secession ranging from a shared language to a failure to consent to the political *status quo*. However, in each case the goal is the same – i.e. to pick out candidates for a right to secede from those who do not possess the right, and to separate different right holders from one another.

Finally, it must be shown why, from a liberal point of view, possession of this property, or set of properties, renders a group uniquely suitable as the holder of a right to secede. Why, for example, is the property of a shared language normatively significant to liberalism in a manner that justifies giving the holder of that property a

[25] See, for example, Dowding, p.76; and Christopher H. Wellman, 'A Defence of Secession and Political

right of independent Statehood that is denied to other groups whose members do not speak a common language? This in turn raises further questions about the nature of liberalism, what type of liberalism is being appealed to, and why liberalism justifies a right to secede, if at all.

Clearly, then, the question of a liberal right to secede raises complex questions which touch upon a wide range of issues in political theory, and which require a careful and systematic method of analysis. The approach adopted in this thesis has been to critically examine the three leading theories which seek to justify a right of secession within the broader framework of liberal political theory. That there are numerous objections to these three theories that this thesis has *not* addressed is undeniable.[26] Similarly, there are also other versions of a liberal right to secede, such as those proposed by Copp[27] and Philpott,[28] which the thesis has also not dealt with.

However, while it is important to acknowledge the limited nature of the current investigation it does, nonetheless, establish what issues should be given prominence in the examination of the three dominant theories of secession – issues which are, particularly with respect to the LD theory, often ignored by many theorists. Moreover, any alternative (liberal) theory will also face the twin challenges of how to: (a) distinguish candidates for a right of secession from other candidates and those who do not qualify for such a right; and (b) show why, from a liberal perspective, the selected groups are uniquely suitable as the sole holders of a right to secede. Consequently, many of the concerns raised with regard to the three theories here under consideration will, to varying degrees, also apply to alternative liberal theories. Thus, while the

Self-Determination', *Philosophy and Public Affairs*, Vol.24, No.2, 1995, p.156.

[26] For example, the claims that: (a) because not all duties are voluntary (e.g. the duty of a parent to look after his/her child) the duty to obey the State should be no exception; (b) voluntarism is incompatible with political society and would lead to the breakdown of social order; and (c) there remains the problem of determining the constituency of the secessionist group. On the first objection see, for example, Dowding, pp.77-78; and Leslie Green, 'Associative Obligations and the State' in *Law and the Community: The End of Individualism?*, ed. Allan C. Hutchinson and Leslie J. M. Green (Ontario: Carswell, 1989). On the second objection see Paul Gilbert, 'Communities Real and Imagined: Good and Bad Cases for National Secession' in *Theories of Secession*, ed. Percy B. Lehning (New York: Routledge, 1998), p.213. On the third objection see Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1956), p.56; Stephen Ryan, [No title] *Politics and the Life Sciences*, Vol.16, No.2, 1997; and David Miller, 'The Nation-State: A Modest Defence' in *Political Restructuring in Europe. Ethical Perspectives*, ed. Chris Brown (London: Routledge, 1994).

[27] David Copp, 'Democracy and Communal Determination' in *Rethinking Nationalism*, ed. J. Couture, K. Nielsen and M. Seymour (Calgary: University of Calgary Press, 1996).

thesis deals directly with only three theories of secession, the relevance its findings extends beyond these three theories to liberal-based theories in general.

As a result of the process of critical engagement undertaken in the thesis, each one of the three theories under consideration was found to suffer from a variety of drawbacks, while at the same time also making a valuable contribution to understanding some of the various issues raised by a liberal right to secede. Miller, for example, raises valid questions concerning the necessary sociological pre-conditions for the flourishing of liberal practices and institutions, and how these may be impacted by a group's secession. However, he fails to make a convincing case for the nation as the only, or the best, source of these pre-conditions.

Buchanan's defence of a highly restrictive JC theory, on the other hand, also contains valuable insights regarding the possible consequences of a group's secession and the weight that should be attached to these in assessing the relative worth of rival theories. However, because all theories of secession could, in one way or another, be described as JC theories, JC theories cannot be distinguished as a separate type of theory. Furthermore, while Buchanan is quite correct to stress the consequences of a group's secession, he does not succeed in adequately defending the considerable weight that he assigns to the value of State sovereignty and the maintenance of existing international boundaries.

Finally, while Beran's LD theory raises many significant issues, these are not developed in a systematic manner. Not only does Beran's individualism conflict with his use of democratic majoritarianism, but he fails to address fundamental questions regarding the justification of the principle of individual self-determination within liberal theory. By examining the linkages between the question of how liberalism should respond to the two issues of secession and minority rights, it was shown that there are two different views of liberalism. However, neither of these two types of liberalism will yield a theory that mirrors that of Beran. Moreover, given that Beran ascribes a right of secession, not to self-defined voluntary groups, but to territorial communities which are then legitimated in coercing others to secede who have the

[28] Daniel Philpott, 'In Defense of Self-Determination', *Ethics*, Vol.105, 1995.

misfortune to be included as a numerical minority within this arbitrarily defined aggregate of individuals, it is questionable whether his theory could qualify as a liberal theory at all.

This is not to also say that these two forms of liberalism are necessarily incapable of ultimately producing a satisfactory normative theory of secession. Rather, the point is simply that any theory of secession predicated upon these two understandings of liberalism will differ substantively from the three theories considered here. Moreover, as was pointed out earlier, each of these two forms of liberalism also raises unresolved issues concerning the identity of the right-holder and the conditions under which a group, or individual, is entitled to secede. Consequently, while the secession debate significantly advances our understanding of the various issues pertinent to the development of satisfactory liberal theory of secession, the case for such a theory remains, at best, inconclusive.

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